

Missouri Attorney General's Opinions - 1955

Opinion	Date	Topic	Summary
1-55	Jan 5	COUNTY COURTS. ROADS AND STREETS.	The County Court of Holt County, Missouri has the authority to spend county money for a right of way inside the city limits of Mound City for a road to be taken over by the state.
1-55	Jan 27	ADJUTANT GENERAL. SOLDIERS' BONUS.	Not necessary that application for soldiers' bonus be filed on blank furnished by Adjutant General, but informal letter will suffice.
1-55	Oct 28	SALES TAX. MOTOR VEHICLES.	Farm Tractors are not subject to motor vehicle sales tax under the provisions of Section 144.450, Laws of Missouri 1951, page 854, but sales tax must be paid upon their purchase as a sale of tangible property.
1-55	Nov 29	ADJUTANT GENERAL. COMMISSIONS MISSOURI NAVAL MILITIA.	Commissions in force prior to the enactment of House Bill 133, 1951, have either been terminated by administrative action or have lapsed by operation of law.
2-55	Jan 6	AGRICULTURE. STATE ENTOMOLOGIST.	State entomologist may establish quarantine to prohibit the transportation into the state of products, articles or things capable of carrying the pink bollworm.
2-55	Apr 21	FOOD AND DRUGS. DIVISION OF HEALTH MAY EMBARGO FOOD AND DRUGS WHEN.	(1) Div. of Health legally unauthorized to embargo food, drugs, devices or cosmetics under Sec. 196.030, RSMo 1949, or any other of Missouri's Food and Drug Act for sole purpose of holding same until such goods can be seized by Federal Government in Federal Court proceedings under Federal food and drug laws. (2) Div. of Health can embargo food or drugs for purposes mentioned in Sec. 196.030 and may use results of examination, analyses or laboratory tests made by the Federal Government as evidence in any case instituted for violation of Mo. food and drugs laws. (3) Criminal proceedings for violation of Mo. food and drug laws may be brought even though same offense is crime under Federal statute. Defendant may be prosecuted, convicted and punished for same act on same evidence under both statutes.
2-55	July 20	METROPOLITAN ST. LOUIS SEWER DISTRICT. DIVISION OF HEALTH. REGULATIONS.	The Division of Health is under the responsibility of requiring submission to it and approval by it of plans and specifications for improvements and extensions of sewers on the Metropolitan St. Louis Sewer District.
2-55	Aug 30	Hon. A. J. Anderson	WITHDRAWN
2-55	Dec 1	PURE FOOD AND	Buisman's Famous Dutch Flavoring creates, when blended with coffee

		DRUGS. ADULTERATION. MISBRANDING. MISLABELING. BUISMAN'S FAMOUS DUTCH FLAVORING.	beans, an adulterated product whose sale is prohibit by Sec. 196.015(1), and the distribution to consumers of Buisman's Famous Dutch Flavoring (as presently labeled) is the sale of a misbranded product, the sale of which is prohibited by the same section.
3-55	Mar 1	MAGISTRATES. MAGISTRATE COURTS.	State to pay salaries of employees of the Magistrate Court of Greene County as follows: one chief clerk, \$3300 per annum; one deputy clerk for each magistrate, \$2400 per annum; and such other employees as the court may appoint in an amount not to exceed \$1500 per annum.
3-55	Mar 16	VETERINARY MEDICINE.	An unauthorized person may, by proper proceeding, be restrained from the practice of veterinary medicine.
3-55	May 23	STATE COMPTROLLER: ADOPTION OF EXPENSE ACCOUNT FORMS.	Forms for rendering expense accounts of state officers and state employees proposed by the Division of Comptroller and Budget, to be filed with the Secretary of State on May 20, 1955, to become effective June 1, 1955, are in the public interest and are a necessary aid to the Comptroller and State Auditor in performance of their duties relating to such expenditures and should be adopted by the Division.
4-55	Sept 29	COUNTIES. COUNTY COURT. UTILITIES. UTILITY POLES.	A county court must advertise for bids on a contract to remove and relocate utility poles and lines from proposed right of ways of roads in the county, when the contract exceeds \$500.00 and the poles and lines are now on private property.
5-55	Aug 19	MOTOR VEHICLES. DRIVERS' LICENSES. REVOCATION OF. SENATE BILL NO. 251. 68TH GENERAL ASSEMBLY.	1) "Receiving a Record" , of an operator's or chauffeur's conviction in a circuit or magistrate court as used in Sec. 302.271, Senate Bill No. 251, 68th General Assembly, has reference to final judgment entered of record in said court convicting defendant of an offense referred to in section, for which it is mandatory duty of the trial court to revoke the license of said defendant. 2) One convicted of any offense under provisions of Section 302.271, and judgment final, magistrate judge can revoke driver's license of convicted defendant but not for any specified period of time. 3) One convicted in magistrate court of careless and imprudent driving of a motor vehicle, and evidence conclusively shows defendant to be under influence of intoxicating liquor at the time offense is alleged to have occurred, magistrate court cannot revoke driver's license under Subsection 2, Section 302.271, Senate Bill 251, authorizing revocation of driver's license upon conviction of one driving a motor vehicle while he is under the influence of intoxicating liquor or a narcotic drug.
5-55	Sept 21	TREASURER. COUNTY TREASURER. COUNTY OFFICERS.	The county court may pay compensation to or reimburse the county treasurer for compensation paid to a clerk in the Treasurer's office where it appears that such expenditures are indispensably necessary to

		COUNTY COURT.	the conduct of the office, if the County Budge Law is complied with.
5-55	Oct 24	Hon. Harold W. Barrick	WITHDRAWN
6-55	July 15	COUNTY COURT. COUNTY CLERK.	In keeping record of proceedings of county court, county clerk should obey direction of majority of court.
6-55	Aug 30	PROSECUTING ATTORNEYS.	Social Security payments.
7-55	Nov 1	Hon. Max B. Benne	WITHDRAWN
9-55	Mar 1	SEARCH AND SEIZURE. CONSTITUTIONALLY CHARTERED CITIES.	Municipal court, chartered city, unauthorized to issued warrants for search and seizure.
9-55	Apr 4	PROSECUTING ATTORNEYS. CITY ORDINANCES. ST. LOUIS COUNTY.	A prosecution by the Prosecuting Attorney of St. Louis County would not lie against an unlicensed electrician who made an installation in an incorporated city in St. Louis County.
9-55	June 2	COUNTY COURT. MUNICIPALITIES.	County Court may not incorporate a city, town or village, where proceedings have been instituted by a City Council, to extend the city limits to encompass the same area; a constitutional charter city is not a city of the second class.
9-55	June 27	PUBLIC OFFICERS – DEPUTY COUNTY ASSESSORS.	Section 8 of Article VII of the Constitution of 1945 of this State prohibits the election or appointment of non-residents to public office in this State.
9-55	Sept 8	COURT REPORTERS. SALARIES. CIRCUIT COURT REPORTERS. APPROPRIATIONS. OFFICIAL COURT REPORTERS.	S.C.S.H.B. #384 of the 68th General Assembly requires the state to pay one-fourth of the salary of a court reporter, and in the absence of both an appropriation by the Legislature for this purpose and a statutory requirement that the state reimburse counties which pay the total salary, a court reporter will receive only three-fourths of his salary.
9-55	Oct 17	Hon. Cowgill Blair, Jr.	WITHDRAWN
9-55	Nov 18	SHERIFFS. JAILERS.	The term “deputy sheriffs: are used in Senate Bill 214, does not include persons employed under the provisions of Sec. 57.240 to attend the jail in counties of the second class.
10-55	Mar 1	LOTTERIES. GAMBLING. PROSECUTING ATTORNEY.	The scheme herein described is a lottery; while a Prosecuting Attorney has broad discretion in determining whether a particular criminal case should be prosecuted, a refusal to prosecute lottery cases generally, would constitution an abuse of his discretion.

10-55	Apr 18	OPTOMETRY. EYEGLASSES. SPECTACLES.	Neither insertion of lenses into spectacle frames, nor the adjustment of such frames to the wearer's face which does not affect or change the measurements upon which the original prescription is based, are required to be done by a registered optometrists.
10-55	Apr 28	MORTGAGED PROPERTY – REMOVING OR CONCEALING WITH INTENT TO DEFRAUD. VENUE.	The venue in the prosecution of any person for removing or concealing mortgaged property with intent to defraud the mortgagee or others, in violation of Sec. 561.570, RSMo 1949, lies in the county in Missouri from which the mortgaged property was removed with the intent to hinder, delay or defraud the mortgagee.
10-55	Sept 6	ELECTIONS. REGISTRATION. VOTERS. QUALIFIED VOTERS. SENATE BILL #297.	The county clerk of those counties coming within the provisions of S. B. 297 is required by Section 116.040, RSMo 1949, to register all persons who seek registration after August 29, 1955, using the three card system stated in said Sec. 116.040; under Sec. 116.060, RSMo 1949, county clerk of those cities coming within said bill 297 must maintain and distribute the three registration cards and binders called for that he has at that time, and for those voters for whom he has none he must use the old registration books made up under Chapters 114 or 115.
10-55	Sept 29	INSANE PERSONS. CONSTITUTIONAL LAW.	Procedure outlined in Sec. 4 of S.B. No. 59, 68th General Assembly, guarantees "due process." Secs. 5 and 6 of said Act do not require alleged insane person to ask for judicial determination of his alleged insanity before temporary commitment. Sec. 29 of said Act defines a criminal offense and is enforceable.
10-55	Oct 17	HOSPITALS. COUNTY HOSPITALS. BOARD OF TRUSTEES.	County hospital board of trustees' rule that, for a short time, the name of any patient who has died will be withheld from public pending notification of next of kin, is reasonable regulation and thus authorized by Secs. 205.190(4) and 205.280, RSMo 1949, but the rule that any patient who expressly requests it need not have his name revealed is unreasonable and thus violates these sections.
12-55	Sept 14	AUTOMOBILES. MOTOR VEHICLES. RECIPROCITY WITH OHIO.	Missouri does not have reciprocity with Ohio with respect to commercial vehicles having three or more axles, and such commercial vehicles owned by Ohio residents should be required to register in Missouri.
13-55	Jan 5	TAXES. MUNICIPALITIES.	The City of Doniphan should not pay taxes upon its city hall.
13-55	Dec 7	SALES TAX. TAXATION. PUBLIC UTILITIES.	Electrical current used to prevent electrolysis of pipe lines not subject to sales tax.
15-55	Feb 23	COUNTY COURT.	(1) A county court may not lawfully permit the usage of public

		PUBLIC OFFICERS.	property in the form of office space in a county courthouse for the conduct of a private commercial enterprise, either with or without a formal leasing arrangement; and (2) that a deputy clerk of the county court in a county of the fourth class is not prohibited from engaging in the business of preparing abstracts of titles in such counties.
15-55	Feb 28	AGRICULTURE. COMMISSIONER OF AGRICULTURE. VETERINARIAN. OFFICERS. SERVICES AND SALARY.	The commissioner of agriculture may fix the salary of the state veterinarian at an amount greater than the salary of the commissioner of agriculture.
15-55	Mar 21	OFFICERS.	Duties of the prosecuting attorney and member of county library board of fourth class county are so repugnant or inconsistent as to render offices incompatible. One person cannot legally hold both offices at the same time in same county.
15-55	Mar 22	ANIMALS. PERSONAL PROPERTY. TAXATION. CONSERVATION COMMISSION. WILDLIFE.	Captive minks kept by a private individual for commercial purposes are taxable property.
15-55	Apr 5	ANIMALS. STOCK LAW. ELECTIONS. PETITIONERS.	Householders within an incorporated city of the fourth class, which city has a stock law, are qualified to petition the county court for a county-wide election on the question of restraint of domestic animals, under Section 270.090, RSMo 1949.
15-55	Apr 18	MILITARY PERSONNEL RECORDERS OF DEEDS.	Holder of discharge from armed forces of United States may have the same recorded in any county of this state.
15-55	May 4	Mr. Roy L. Carver	WITHDRAWN
15-55	June 10	AGRICULTURE. EGG DEALERS. LICENSES.	The Commissioner of Agriculture may not delay the licensing of egg retailers, dealers and processors to a date beyond the date when such person, firms or corporations are required to obtain licenses as provided by existing law.
15-55	June 17	JAIL BREAKING. CITY ORDINANCE.	A person who escapes from a city jail wherein he was confined after conviction for violation of a city ordinance, may not be prosecuted under Sections 557.380 or 557.390 RSMo 1949.
15-55	June	JAILS.	A person legally confined in the county jail for nonpayment of costs

	22	INSOLVENTS. DISCHARGES.	properly assessed against him in a criminal proceeding is not entitled to discharge as an insolvent, except upon strict compliance with the procedure set forth in Chapter 551 RSMo 1949.
15-55	July 14	Hon. John F. Carmody	WITHDRAWN
15-55	July 18	SOIL CONSERVATION. WATERSHED PROTECTION AND FLOOD PREVENTION ACT.	A soil conservation district is a “local organization” within the meaning of Public Law 566; the supervisors of a soil conservation district have authority to carry out, maintain, and operate “works of improvement” of that portion of a small watershed which lies within the soil conservation district of which they are supervisors, under the watershed protection and flood prevention act; that the supervisors are authorized to expend the funds of the district, and to use funds that are made available to them from federal, state, or local sources, both public and private, in carrying out the provisions of the Watershed Protection and Flood Prevention Act as set forth in Public Law 566.
15-55	July 27	AGRICULTURE. EGG LAW. RULES AND REGULATIONS.	Review of proposed rules and regulations of the Department of Agriculture implementing House Bill No. 177 of the 68th General Assembly.
15-55	Aug 18	CITIES, TOWNS AND VILLAGES. LEGAL PUBLICATIONS.	Cities of Fourth Class must publish financial statement required by Sec. 79.160 RSMo 1949, in newspaper meeting requirements set forth in Sec. 493.050 RSMo 1949. Described financial statement does not meet requirements of Sec. 79.160 RSMo 1949.
15-55	Sept 6	TAXATION. TOWNSHIP ASSESSORS. COUNTY ASSESSORS. ASSESSMENTS.	After township assessor has delivered assessor’s book to county clerk he may not repossess it in order to correct erroneous valuations of property. Such corrections may be made only by county board of equalization.
15-55	Sept 29	AGRICULTURE. ICE CREAM.	House Bill 257 enacted by the 68th General Assembly relating to the manufacture and sale of ice cream and related frozen products as defined therein does not relate to the manufacture and sale of other products not defined in said Act.
15-55	Nov 21	SCHOOLS. SCHOOL DISTRICTS. INSURANCE. COUNTY FOREIGN INS. TAX FUND. COUNTY CLERK.	Apportionment of funds received from County Foreign Insurance Tax Fund in July, 1955, should have been made on basis of 1954 enumeration; district receiving less than its proper share of supplemental apportionment can sue districts receiving excess amounts and recover such amounts provided money has not already been spent for school purposes; error may also be corrected voluntarily by co-operative action of officers and agencies concerned.
15-55	Nov 22	PUBLIC LAW 566.	A levee and/or drainage district and/or a county court is a “local

		POLITICAL SUBDIVISIONS. LOCAL ORGANIZATIONS.	organization” within the meaning of Public Law 566, and so is qualified to enter into cooperative agreements with the Secretary of Agriculture of the United States for works of improvement in flood and erosion control.
15-55	Nov 29	DEPARTMENT OF CORRECTIONS. MISSOURI STATE PENITENTIARY. APPROPRIATIONS.	Construing House Bill 588, Sec. 13850, appropriation for Missouri State Penitentiary.
15-55	Dec 1	AGRICULTURE. ECONOMIC POISONS. POISONS.	Review of proposed rules and regulations of the Department of Agriculture implementing House Bill 101 of the 68th General Assembly.
15-55	Dec 5	ECONOMIC POISONS. AGRICULTURE. INSECTICIDES.	Mixture of fertilizer and insecticide is an “economic poison”.
15-55	Dec 19	STATE PURCHASING AGENT. MOTOR VEHICLES.	Where a successful bidder contracts with the state to supply new automobiles and agrees to accept as part payment of the purchase price automobiles currently being used by the state the depreciation occasioned by the use of said automobiles in the ordinary course of business should be borne by the bidder.
16-55	Sept 8	REGISTRATION LIST. COUNTY CLERK.	County clerks of those cities that come within the provisions of Senate Bill 297 have until the last day of October 1955 to complete and file a check of the registration lists in such cities whether such check is made through the United States Post Office Department or by means of canvassers.
17-55	Sept 29	Hon. John R. Clark	WITHDRAWN
17-55	Oct 6	GOVERNOR. TERM OF OFFICE.	The term of the Governor of Missouri begins on the second Monday in January following his election, and continues for a term of four years and until a successor is elected and qualified.
18-55	Sept 19	COUNTY COURTS. ELECTRICAL COOPERATIVES. RIGHT OF WAY.	(1) An electrical cooperative which maintains poles and lines on public right of way along present roads which are to be widened, but which are not within the state highway system, must remove and relocate such poles and lines on order from the county court or county highway engineer; and the electrical cooperative must bear the expense of such removal and relocation. (2) An electrical cooperative which maintains poles and lines on private property along present roads which are to be widened does not have to remove and relocate the poles and lines unless and until the county or state acquires the cooperative’s vested interests by way of easement in the private property either by purchase or by condemnation.

18-55	Oct 13	COUNTY ASSESSORS. COUNTY COURT. BONDS.	The county court of a fourth class county must pay for the premium on the county assessor's surety bond.
18-55	Nov 8	MILEAGE. SHERIFFS. STATE HOSPITALS.	In taking a patient or patients to or from a state hospital, the sheriff is only entitled to mileage for miles actually traveled.
18-55	Dec 30	ASSESSORS. TOWNSHIP ORGANIZATION COUNTIES.	In township organization counties a township assessor is not required to give bond.
19-55	Jan 27	COUNTY PURCHASES. COUNTY BUDGET LAW.	In second class county, court has discretion in determining whether or not annual purchases need be advertised. Contracts for repair of road machinery under certain circumstances need not be let on competitive bidding.
19-55	Feb 1	COUNTY TREASURERS.	County treasurer may require claimant of fees taxed as criminal costs to make satisfactory proof that such claimant is not indebted to the state or county for any of the items enumerated in Section 550.270, RSMo 1949, before disbursing fees to such claimant.
19-55	Mar 23	OLD AGE ASSISTANCE. REAL PROPERTY. DEED.	Eligibility of applicants for old age assistance and recipients to continue to receive benefits under State Social Security Act governed by provisions of said Act and not by decision rendered in St. Louis County National Bank vs. Fielder, 260 S.W.2d 483.
19-55	Apr 21	PENSION. CONVEYANCE. DEED.	Claimants and recipients of old age assistance benefits are disqualified to receive benefits when deeding property without fair and valuable consideration to children, with irrevocable instructions to escrow agent to deliver deed to grantees upon death of grantors.
19-55	May 23	PENSIONS. CONVEYANCE. DEEDS.	Claimants and recipients of old age assistance benefits are disqualified to receive benefits when deeding property without fair and valuable consideration.
19-55	July 13	COSMETOLOGY. STATE BOARD OF.	The State Board of Cosmetology may not prohibit the employment of both colored and white operators in the same establishment nor prohibit both white and colored persons from patronizing such establishment.
19-55	Sept 8	CRIMINAL LAW. NARCOTIC DRUG ACT. HABITUAL CRIMINAL ACT.	Phrase "any subsequent offense" used in Sec. 195.200, RSMo 1949, refers only to offenses defined, charged and found under Chapter 195, RSMo 1949, Missouri's Narcotic Drug Act. Missouri's Habitual Criminal Act, Secs. 556.280 and 556.290, RSMo 1949, covers convictions in Federal courts.
19-55	Oct 17	PROSECUTING	The costs of preparing a transcript to be used in a prohibition

		ATTORNEYS. COSTS.	proceeding growing out of a criminal prosecution, provided such transcript is necessary, would be a proper county charge and could be paid out of county funds if proper budgetary requirements have been met.
19-55	Oct 20	DEDICATION. PUBLIC ROADS. KING BILL. COUNTY COURT.	Public roads may be established by dedication and acceptance so as to qualify for improvement, construction, etc., under Section 231.460, RSMo 1949, the King Bill.
19-55	Dec 7	COUNTY COURT. ACCOUNTING OFFICER. COUNTY SUPPLIES. COUNTY BUDGETS.	1. County court of a second class county is not obligated to pay for any supplies or personal services acquired by contract or by order unless such contract or order bears the proper certification of the accounting officer. 2. A county court of a second class county is not obligated to pay for supplies acquired by contract or by order when the price of the bill for such supplies so acquired exceeds the encumbrance stated in the certification of the accounting officer for the contract or order. 3. The county court cannot voluntarily pay for such personal services or supplies for which it is not legally obligated to pay even if there is a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged, and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made. 4. County officers, who acquire supplies or personal services under the circumstances set out in 1 and 2 above, are liable personally and on their bond for such obligations under Section 50.650 RSMo 1949.
20-55	Apr 21	WITNESSES. RIGHT OF CONFRONTATION. RIGHT OF CROSS- EXAMINATION. EVIDENCE.	House Bill No. 219 of the 68th General Assembly, proposing to amend Sections 561.450 and 561.460, RSMo 1949, is unconstitutional.
20-55	May 18	SHERIFF. DEPUTY SHERIFFS. SALARY OF DEPUTY SHERIFFS. FEES OF SHERIFFS. SHERIFF'S FEES.	Deputy sheriff of Class 3 county cannot be paid fee of \$3.00 per day for attendance upon court in addition to his regular salary.
20-55	Aug 10	ASSESSORS. MERCHANT'S TAX.	Under the provisions of Section 150.055, the county assessor is required annually, prior to the first Monday in May, to visit and inspect each place of business, warehouse, store or other establishment owned and operated by any merchant within the county for the purpose of acquiring information to be used as a basis for comparison

			with the statement returned by a merchant. Such information is to be returned by the assessor on forms prescribed by the county court to the county board of equalization.
21-55	Jan 10	MARRIAGE LICENSES. RECORDERS OF DEEDS. FEES. SALARIES.	A recorder of deeds is entitled to a fee of \$1.00 for the recordation of a marriage license and the return thereon; and is further entitled to a fee of 50¢ for each marriage certificate filed with him if the recorder makes the report required by Section 193.340, RSMo 1949.
21-55	Apr 7	OFFICERS.	Assignment of future unearned compensation by county officer is null and void. County court is legally unauthorized to advance unearned compensation to assessor and before settlement made with court.
21-55	July 6	CONSERVATION COMMISSION. FISH.	Proprietor of private pond stocked with artificially propagated fish obtained from sources without the State of Missouri is required to have a Wildlife Breeder's permit.
21-55	Aug 23	PROBATE COURT. INDIGENT INSANE. COUNTY COURT.	In instances where the probate court appoints an attorney to represent an indigent insane in a proceeding before the probate court, the fixing of the fee of such an attorney is a matter solely within the authority of the probate court; such fee so fixed is a part of the cost which should be paid by the county when payment cannot be obtained out of the estate of the insane person; refusal to pay the full amount of the fee fixed by the probate court constitutes a rejection on the part of the county court, from which an appeal can be taken, to the circuit court within ten days; although no appeal is taken from the action of the county court, the county court may, at a subsequent term, change its order regarding this matter and make an additional payment in those cases where the \$10.00 payment was not received by the claimant as full payment of his claim against the county.
21-55	Oct 28	RECOVERY OF OVERPAYMENT OF SALARY. DEPUTY'S SALARY.	County may recover overpayments paid public officers. The county court is not personally liable. The statute of limitations applies to counties.
22-55	Mar 24	DRAINAGE DISTRICTS.	Eight questions relating to the powers and duties of boards of supervisors of drainage districts organized in circuit court.
22-55	June 27	Hon. C. W. Detjen	WITHDRAWN
24-55	Feb 11	ELECTIONS.	(1) Bipartisan committee provided in Section 121.220, RSMo 1953 Cum. Supp., may not delegate its duties to subcommittees; (2) Central committee of two principal political parties may provide for attendance of representatives at inspection and examination of voting machines for use in election, under Section 121.080, RSMo 1953 Cum. Supp.; (3)

			Regular staff employees of St. Louis Board of Election Commissioners may be appointed to serve on bipartisan committee provided for in Section 121.220, RSMo 1953 Cum. Supp.
24-55	Mar 11	ELECTIONS. REGISTRATION.	Registration lists required to be posted in cities of over 600,000 need not indicate the race or color of a registered voter.
24-55	June 10	OFFICES. INCOMPATIBILITY.	In a fourth class city under the mayor-council form of government, so far as state law is concerned, the same individual may simultaneously hold the position of water, street, and sewer commissioner and the position of city clerk; the position of water, street, and sewer commissioner, and the position of city treasurer; and the position of water, street, and sewer commissioner, and the position of city collector, but that the holding of the positions of city clerk, city treasurer, and city collector, or of any two of these three offices, by the same persons at the same time would be incompatible.
24-55	Sept 27	PUBLIC SCHOOL RETIREMENT SYSTEM. SCHOOLS.	Definition of words "substitute" and "temporary" as used in House Bill No. 387, 68th General Assembly, relating to Public School Retirement System.
24-55	Dec 9	CORONERS. INQUESTS.	When there is no coroner in a county, there is no means by which an inquest may be held.
25-55	Sept 8	TELEPHONE EXCHANGES. INDUSTRIAL INSPECTION.	A telephone exchange is not subject to industrial inspection, but associated activities collateral to the operation of the telephone exchange are subject to industrial inspection if they come within the compass of paragraph 2 of Section 291.060 RSMo 1949.
26-55	Nov 22	Hon. Raymond Eckles	WITHDRAWN
27-55	Jan 14	MOTOR VEHICLES. RECIPROCITY.	Reciprocity in regard to vehicles hauling for hire exists between the State of Missouri and the State of Florida in interstate movements.
27-55	Apr 27	OFFICERS. NEPOTISM.	Violation of nepotism provision by appointing authority does not authorize removal of public officer appointed; appointment of more persons from one political party to county highway commission than statute authorizes does not disqualify the person from county highway commission.
29-55	Feb 28	COUNTIES. MUNICIPAL CORPORATIONS. TAXATION. CITIES, TOWNS AND VILLAGES.	Mandamus will lie against a county to compel issuance of warrants in order to satisfy judgment obtained against county for tax bills for street improvements issued by city of fourth class if there is sufficient money in general fund of the county available to pay same. If not sufficient money in general fund, mandamus will lie to require levy within constitutional limits to provide funds for payment of judgment. Immaterial that county has not included payment of such tax bills in its budget.

31-55	Jan 13	PRELIMINARY EXAMINATIONS. MAGISTRATES.	The magistrate judge of Benton County is not precluded from holding a preliminary examination, based upon affidavits for state warrants filed in the magistrate court of Benton County, by the fact that previously identical affidavits for state warrants were filed in the magistrate court of Benton County, and that upon a preliminary examination held thereon, same defendant was ordered discharged.
31-55	May 4	SCHOOL DISTRICTS. TAXATION. LEVY.	(1) Board of directors may certify amended estimate under Sec. 165.077, RSMo 1949, at any time prior to action being taken upon original estimate and (2) such recertification is discretionary with board of directors.
31-55	May 9	SUNDAY. SHERIFF. EXECUTIONS.	Writ of executions may be validly served on first day of the week, commonly called "Sunday."
31-55	May 13	BOARD OF REHABILITATION.	Not authorized to purchase prosthetic devices for employee.
31-55	June 28	TAXATION. EXEMPTIONS.	Burden of establishing right to exemption from taxation upon person claiming exemption. Each claim for exemption a question of fact must be decided on merits. College fraternities and labor unions not entitled to tax exemption as non-profit, charitable organizations.
31-55	Aug 23	HIGHWAYS. COUNTIES. ACQUISITION OF RIGHTS-OF-WAY.	St. Louis County is not liable for the cost of acquisition of rights-of-way acquired by the State Highway Commission for a road to be built through the aforesaid county, in the absence of a contract so providing.
31-55	Sept 8	ANNEXATION. TOWNS AND VILLAGES. UNINCORPORATED LAND.	The provisions of Section 71.015, RSMo Cumulative Supplement 1953, have no application to the procedure for the extension of boundaries by the annexation of unincorporated areas by any village in the state.
32-55	Apr 12	CONSTABLES.	It is the duty of the several constables of St. Louis County to attend the magistrate court or courts of said county and to serve the process appertaining to the business of the court or courts. If any doubt exists as to what officer should discharge either of the above-mentioned duties, such question may be resolved by ordinance of the county council.
32-55	Aug 30	HIGHWAY PATROL. WEIGHT. TESTIMONY.	Members of the Missouri State Highway Patrol may stop upon the highway a motor vehicle which the patrolman has reason to believe is in excess of the weight limit allowed by the laws of this state; may direct the driver of such vehicle to proceed with the vehicle to the nearest weight station; may cause the vehicle to be weighed; and if it be found to be in excess of the weight limit aforesaid, the patrolman

			may file charges against the driver of the vehicle and testify in court regarding the weight.
32-55	Sept 27	Hon. C. Rouss Gallop	WITHDRAWN
32-55	Nov 17	COUNTY MEMORIAL HOSPITALS. STATE AID.	Section 13.600 of the 1955-1957 State of Missouri Appropriation Law does not authorize any additional amount to a county for its memorial hospital if the county has received its full authorization of \$10,000 under the provisions of Section 184.290.
32-55	Dec 20	SEARCH WARRANTS.	Search warrants may be directed to any peace officer.
32-55	Dec 27	ARRESTS. POLICE. ST. LOUIS COUNTY.	(a) A defendant in a criminal case need not be arraigned in open court before his commitment to jail; (b) In St. Louis County, a person may not be arrested for a misdemeanor without a warrant, unless the arresting officer saw the misdemeanor committed. The above is true for police officers of a municipality or a county and whether the misdemeanor is a violation of a state law or a city ordinance. County and city ordinances cannot set aside a state law.
33-55	Aug 1	INSURANCE.	Fully described Pre-Arranged Burial Agreement purportedly sold by McMikle Funeral Home, East Prairie or Charleston, Missouri, is a contract of insurance within language of Sec. 375.310 RSMo 1949.
33-55	Sept 29	INSURANCE. BURIAL AGREEMENTS.	Fully described Pre-Arranged Burial Agreement is not an insurance contract within language of Section 375.310, RSMo 1949.
33-55	Nov 14	SENATE BILL 297. VOTER REGISTRATION. REGISTRATION. REGISTRATION LIST. VOTERS. QUALIFIED VOTERS. ELECTIONS.	The county must bear any expense necessary to carry out Senate Bill No. 297, 68th General Assembly; the county is the interpreter of its effect and applicability; and signature lists prepared in accordance with Section 114.100, RSMo 1949, may still be used to check the signature of voters.
34-55	Sept 15	SAVINGS AND LOAN ASSOCIATIONS. VOLUNTARY DISSOLUTION. CUSTODY OF RECORDS.	When a savings and loan association is voluntarily dissolved and liquidated in accordance with Sections 369.465, 369.470 and 369.475 RSMo 1949, and during liquidation a director is given custody of records, that after liquidation is completed and association is legally non-existent, director not required to retain possession of records any longer.
34-55	Oct 24	SAVINGS AND LOAN ASSOCIATION. MINOR SHAREHOLDERS MAY	Under provisions of Sections 369.150 and 369.155, Laws of Missouri 1953, page 229, minor's agreement to surrender certificates of shares upon payment to him of cash value, his receipt and release of liability to the association is valid when it clearly appears minor understands

		MAKE VALID CONTRACT WITH ASSOCIATION, WHEN.	contract. When fully executed by parties, minor cannot subsequently avoid contract during minority or upon reaching majority and bring action to recover shares or their value. 2) Savings and loan association cannot reissue certificates of shares of minor in name of person other than the minor, or in names of minor and another. 3) Said sections do not authorize minor to contract for assignment, transfer and delivery of his certificates of shares with any party other than issuing association, and contract for assignment not with association may be avoided during minority or upon reaching majority, and minor may bring action to recover shares or their value.
35-55	Jan 19	STATE PARK BOARD. CONSTITUTION. TITLE.	Missouri State Park Board is authorized to lease land for state park purposes.
35-55	Mar 23	ANNEXATION.	Order of the county court of Oregon County made February 7, 1927, did effect the annexation of Standley's Second Addition to the Village of Koshkonong.
35-55	Apr 21	COSTS. CRIMINAL COSTS. MAGISTRATE COURT. SHERIFFS. PROSECUTING ATTORNEYS.	Costs assessable on a plea of guilty to a misdemeanor in the magistrate court.
35-55	May 5	COUNTIES. COUNTY COURTS. COUNTY FINANCES. COUNTY BUDGETS. CLASS 6 EXPENDITURES.	A third class county may not make expenditure for items in class 6 of its budget until it has sufficient cash on hand to meet all expenses of the county for the current year in the preceeding five classes plus any obligations previously incurred in class 6.
35-55	Oct 17	STATE EMPLOYEE- RIGHT TO ENGAGE IN SAME WORK HE DOES FOR THE STATE FOR PRIVATE GAIN – WHEN. USE OF STATE PROPERTY TO TRANSPORT WORKING EQUIPMENT IN PRIVATE BUSINESS.	1. An individual employee of the state may engage in the same kind of work he is performing for the state, for his own profit, if he is not required by statute to give his time exclusively to the state and if his private work does not interfere with the performance of his work for the state and such work is not detrimental to the state's interest. 2. The use of state property by an individual employee of the state to transport working equipment to and from the place of private business of the employee is unlawful.
35-55	Dec 29	FIREARMS.	Firearms which do not have stamped upon them the name of the

			maker of the serial number may not be purchased by a Missouri resident and brought into Missouri.
36-55	Mar 29	PHYSICIANS & SURGEONS. PRACTICE OF MEDICINE. DEFINITION OF "PRACTICE OF MEDICINE".	Unlicensed physicians may not engage in practice of medicine, regardless of nature of employer or character of supervision.
37-55	Jan 13	CHIROPODISTS. PROFESSIONS. LICENSES.	False, misleading or deceitful advertising by a chiropodist may be sufficient ground for revocation of his license to practice chiropody.
37-55	Apr 28	CHIROPODISTS. PHYSICIANS & SURGEONS. LICENSES.	The license of a lady chiropodist may not be revoked for having two entries in the classified section of a telephone directory; one entry under her former surname referring to the second entry listed under her present surname.
37-55	May 16	PENITENTIARY. TREASURER. PUBLIC FUNDS.	Money received by the state from the sale of steel beams salvaged from damaged or destroyed buildings within the Missouri penitentiary, should be deposited in the state treasury to the credit of the ordinary revenue fund.
37-55	July 6	Hon. Roy Hamlin	WITHDRAWN
37-55	July 27	DEPARTMENT OF CORRECTIONS. PENITENTIARY.	Assets of previously existing funds should be transferred to newly created Working Capital Revolving Fund under House Bill No. 377 of the 68th General Assembly.
37-55	Aug 1	PUBLIC RECORDS. RECORDER OF DEEDS. COUNTY COURTS.	Recorder of Deeds has primary responsibility for custody and control of public records in office. Order of county court prohibiting removal of such records from such office is a nullity.
37-55	Sept 6	STATE PENITENTIARY. INTERMEDIATE REFORMATORY. STATE BOARD OF TRAINING SCHOOLS.	Intermediate Reformatory cannot purchase foods for the state penitentiary commissary in lieu of payments for bread obtained from the penitentiary bakery; Board of Training Schools cannot purchase foods for the penitentiary commissary in lieu of payments on account of transfer of inmates to the state penitentiary; state penitentiary should continue to make said charges, the former to be deposited to the credit of the Working Capital Revolving Fund and the latter to the credit of general revenue.
37-55	Nov 21	CHIROPODIST. UNPROFESSIONAL CONDUCT. ADVERTISING.	As used in the statutes concerning revocation of licenses "unprofessional conduct" is convertible with "dishonorable." The State Board of Chiropody may revoke for immoral or dishonorable advertising only.

37-55	Dec 19	CONVICTS. PENITENTIARY.	Convict who escapes from Church Farm may be deprived of three-fourths rule and required to serve full sentence.
39-55	Feb 10	PROBATE JUDGES. PROBATE CLERKS.	Judges of probate courts and clerks of such courts are neither required nor permitted to prepare pleadings for presentation to such courts in connection with the administration of estates of deceased persons.
39-55	Oct 24	MINING LAWS OF MISSOURI. COMPLIANCE THEREWITH, BY WHOM.	Operators of sand and gravel pits are not required to conform to the mining laws of Missouri.
39-55	Dec 16	INSANITY PROCEEDINGS. COSTS.	Costs in all probate insanity proceedings under Senate Bill 59 and House Bill 30, passed by the 68th General Assembly, such bills, as sections, and other sections on the same subject considered herein being in pari materia, must be paid by the county involved if the estate of the subject of the inquiry, if adjudged to be of unsound mind, is insufficient to pay such costs.
40-55	Mar 23	SEWERS. SEPTIC TANKS. NUISANCES. PROSECUTING ATTORNEYS.	The dumping of sewage on adjacent property or the maintenance of leaking septic tanks in unincorporated areas may constitute a criminal offense and may constitute a public nuisance which may be abated by action of the prosecuting attorney.
40-55	Mar 28	SCHOOLS. SCHOOL BUILDINGS. SCHOOL DISTRICTS.	The Board of Directors of a common school district may order the razing of a schoolhouse which has deteriorated so that it is beyond repair and which has no market or salvage value.
40-55	May 18	PUBLIC RECORDS. ASSESSOR OF ST. LOUIS CITY.	Assessment lists and assessment books maintained in office of assessor of City of St. Louis are public records open to public inspection.
40-55	June 27	Hon. Forrest L. Hill	WITHDRAWN
40-55	Sept 8	COUNTIES. COUNTY COURT. SEWER DISTRICTS. SANITATION DISTRICTS.	(1) A county of the third class has no authority by itself to create a sewer or sanitation district either as a statutory district or special benefit assessment district through its county court.
40-55	Dec 6	COUNTIES. SEWAGE DISTRICT. PLANNING COMMISSION.	1. County Planning Commission does not have the authority to include in the official master plan of a county a sewage disposal plan when the county lacks the authority to establish the system. 2. There is presently no authority for Platte County to condemn for right-of-way for a sewage disposal system.

41-55	Mar 7	STATE AUDITOR. CITIES, TOWNS AND VILLAGES.	Cities, towns and villages are political subdivisions of the state within meaning of the statute providing for audit by State Auditor of political subdivisions.
41-55	May 4	SHERIFFS.	Sheriff of one county may employ sheriff of another county to act as guard in transporting prisoners to penitentiary, such guard to be paid as provided in Section 57.290, RSMo 1953 Cum. Supp.
41-55	May 9	MAYORS. CITIES OF THE 4TH CLASS. PUBLIC OFFICIALS. OFFICIALS OF CITIES. CONTRACTING WITH THE CITY.	The Board of Aldermen of the 4th class city is not authorized to pay its mayor a fee of \$30.00 for auditing the books of said city and such action violates the provisions of Section 106.300, RSMo. 1949.
41-55	May 18	PROBATE COURT. ADMINISTRATORS. BONDS.	Securities on an administrator's bond are required to be residents of the county in which the court granting letters of administration is situate.
42-55	Oct 6	SALARY. OFFICES. CORONER. SHERIFF.	A coroner performing the duties of sheriff due to a vacancy in the office may not receive additional salary.
43-55	Jan 3	ELECTIONS. POLITICAL PARTIES. COMMITTEEMAN.	County committeeman holds over until his successor is elected and qualified.
43-55	Apr 11	COUNTIES. COUNTY COURTS. COUNTY POORHOUSE AND INFIRMARIES.	(1) County court has authority on behalf of its county to acquire site for county poorhouse or infirmary. (2) Such site need not be within the corporate limits of the county seat of such county.
45-55	Dec 5	MISSOURI STATE PARK BOARD. LICENSE.	Missouri State Park Board is authorized to accept a license to land in a federal reservoir area for park purposes.
46-55	Aug 19	MUNICIPAL CORPORATIONS. POLICE JUDGE. COURTS. SHERIFFS. OFFICERS.	Office of police judge in city of fourth class incompatible with office of deputy sheriff.
46-55	Dec 19	INVESTMENT. PUBLIC FUNDS. UNIVERSITY FUNDS.	The Board of Curators of the University of Missouri may invest funds other than those appropriated by the General Assembly.

		UNIVERSITY. CURATORS. BOARD OF CURATORS.	
48-55	Jan 6	Hon. Orville F. Kerr	WITHDRAWN
48-55	Mar 17	CITIES. CONSTITUTIONAL LAW.	Senate Bill No. 112 of the 68th General Assembly which provides, in effect, that third class, fourth class and special charter cities of Clay and Jackson Counties having an organized police and fire department, may provide pensions for their policemen and firemen, is unconstitutional, unless there is some difference between those cities in Clay and Jackson Counties and other cities of the same type in the State, reasonably justifying a differentiation in the powers granted to such cities.
48-55	Sept 8	SCHOOLS. SCHOOL DISTRICTS. PUBLIC POLICY. ZONING. COUNTY BD. OF ZONING ADJUSTMENT. BONDS. CONTRACTS.	County bd. of zoning adjustment has no authority to issue special permit to operate trailer court excluding children; contract between school district and property owner whereby property owner agrees to forfeit permit to operate trailer court if children are allowed to reside there void as against public policy; bond conditioned upon performance of such contractual stipulation also void.
49-55	Jan 18	JUDGE OF THE JUVENILE COURT OF JACKSON COUNTY. DETENTION HOME FOR NEGLECTED CHILDREN.	The hiring of building and maintenance employees for a place of detention for neglected and delinquent children in Jackson County, resides in the county court of Jackson county and not in the Judge of the Juvenile Court of said county, and therefore the salaries of said employees cannot properly be included in the budgetary request for appropriations of the Judge of the Juvenile Court of Jackson County.
49-55	Mar 21	SCHOOLS. SCHOOL DISTRICTS. COUNTY SUPERINTENDENTS. COUNTY CLERK. ELECTIONS.	Not necessary that board of education in reorganized school district designate boundaries of voting precincts. In election of county superintendent, county clerk should deliver to president or clerk of board tally sheets of size and number sufficient to contain names of all qualified voters of district. If district in three counties, should deliver three sets of tally sheets for each polling place.
49-55	May 11	PROSECUTING ATTORNEYS. FORFEITURES. SCHOOLS.	The prosecuting attorney of the county is not required to bring a civil action for forfeitures provided under Sections 445.070, .080 and .090, RSMo 1949. Such forfeitures in this case are for the reorganized school district.
49-55	May 23	Hon. Fred Kling	WITHDRAWN
49-55	July 27	ELECTIONS.	Senate Bill No. 3, 68th General Assembly, relates to appropriation of

		SPECIAL. SENATE BILL NO. 3 68TH GENERAL ASSEMBLY. COSTS TO BE FINALLY PAID BY STATE.	State School Funds. By Section B, Act submitted to all voters of State at special election on October 4, 1955, under referendum provisions of Constitution. If no other question to be voted on, election costs shall finally be paid by State of Missouri. Each political subdivision of State to pay cost of holding election therein. Thereafter, it may present claim for reimbursement to State Comptroller, who shall audit same. State Treasurer is then authorized under Section 111.405, RSMo Cumulative Supplement 1953, to pay amount claimed and found due each political subdivision out of any moneys appropriated by Legislature for that purpose.
49-55	Sept 29	URBAN REDEVELOPMENT CORPORATION LAW.	Redevelopment project may be exclusively industrial or commercial.
51-55	Feb 1	COUNTY TREASURER.	County court presumed to have taken increased compensation for county treasurer into consideration when it increased annual compensation.
51-55	Feb 23	SCHOOLS. TRANSPORTATION. COUNTY TREASURERS.	The board of education of a reorganized school district is not obligated to send all of the high school pupils within its district to the same high school, although the cost of transporting pupils to one high school may be somewhat greater than the same cost would be in sending such pupil to another high school. A county treasurer is not required to serve as treasurer of a six-member board school district.
51-55	Mar 7	COUNTY BUDGET LAW.	Obligations incurred prior to December 31 of each year are paid from revenue for year in which they were incurred, and not from anticipated revenue in year in which bill was received.
51-55	Mar 9	COUNTY BUDGET LAW.	Obligations incurred prior to December 31 of each year are paid from revenue for year in which they were incurred, and not from anticipated revenue in year in which bill was received.
51-55	Sept 8	BAIL BOND. SHERIFFS. MISDEMEANORS.	Sheriff is not authorized to fix amount of bond for person arrested without warrant.
51-55	Sept 29	COUNTY BUDGETS. UNBUDGETED REVENUE.	A county court can use unbudgeted revenue, which is part of the Class 6 fund, to pay off an emergency expense budgeted under Class 5 of the budget law if there are not sufficient funds in Class 5 to pay the expense, and if there are cash funds on hand sufficient to pay all claims provided for in Classes 1, 2, 3, 4 and 5 together with any expenses already incurred under Class 6 and if all outstanding warrants constituting legal obligations are paid.
51-55	Oct 10	COUNTY COURTS. COUNTY HIGHWAY	A county court is authorized to purchase a vehicle as county highway equipment to be used by the county highway engineer exclusively in

		EQUIPMENT. COUNTY SURVEYOR. COUNTY HIGHWAY ENGINEER.	county business.
51-55	Oct 27	TAXATION. COUNTY CLERK. FEES.	County clerk in third class county to be paid for making supplemental tax book on same basis that he is compensated for making tax book.
51-55	Dec 1	DEATHS. INQUESTS. CORONERS.	There is no legal obligation imposed upon anyone finding and disposing of a dead body to notify the coroner within whose jurisdiction such body was found, other than the local registrar of vital statistics, and only by him when the death was caused by other than natural causes.
52-55	Mar 3	INSURANCE.	Articles of Incorporation of American Automobile Insurance Company.
52-55	May 4	INSURANCE. TAXATION.	Income on contracts of Old Reliable Atlas Life Society, a stipulated premium plan company, assumed under reinsurance contract by Old American Insurance Company, but not reissued, is not subject to premium tax provided in Section 148.370 RSMo 1949 (Cumulative Supplement, 1953.)
52-55	June 27	INSURANCE.	Articles of Incorporation of Missouri Union Casualty Co.
52-55	July 27	INSURANCE.	Articles of Incorporation of Financial Reserve Life Insurance Company of America.
52-55	Aug 3	INSURANCE.	Articles of Incorporation of American Universal Life Insurance Company.
52-55	Aug 31	INSURANCE.	Articles of Incorporation of Missouri-Western Fire and Marine Insurance Company.
52-55	Sept 21	INSURANCE.	Articles of Incorporation of Holland-America Insurance Company.
52-55	Nov 7	INSURANCE.	Articles of Incorporation of The Union Insurance Corporation of America.
52-55	Nov 29	INSURANCE.	Articles of Incorporation of The Cardinal Life Insurance Company.
52-55	Dec 12	INSURANCE.	Amended Articles of Incorporation of Capital Reserve Life Insurance Company.
52-55	Dec 21	INSURANCE.	Articles of Incorporation of Colonial Casualty Company of America.
52-55	Dec 21	INSURANCE.	Amended Articles of Incorporation of Security National Life Insurance Company.
52-55	Dec 30	INSURANCE.	Stipulated premium plan life insurance companies subject to Secs. 375.330 and 376.300 RSMo 1949. Restrictive provisions in Sec. 375.

			330 touching purchase of realty do not apply to acquisition by gift without valuable consideration, but do apply to subsequent holding and conveying of such real estate. Common capital stock of holding company may be acquired by gift without valuable consideration by stipulated premium plan life insurance company, but subsequent holding of such stock violates Sec. 376.300 RSMo 1949. Method of valuation of real estate acquired by stipulated premium plan life insurance company by gift is not prescribed by statute, and must be left to discretion of Superintendent of the Division of Insurance and company officers.
53-55	Aug 3	CHANGE OF VENUE. FEES. VENUE. VENUE IN COURT OF COMMON PLEAS.	When party takes change of venue on account of prejudice of judge of the Cape Girardeau Court of Common Pleas and a judge from one of the circuit courts is called in to try case, the party taking the change is not required to deposit \$10 change of venue fee with clerk of Cape Girardeau Court of Common Pleas.
54-55	Jan 13	SOIL CONSERVATION DISTRICT. SMALL WATERSHED.	Supervisors of a soil conservation district may administer the business of that portion of a small watershed which lies within the soil conservation district of which they are supervisors.
57-55	Jan 6	INHERITANCE TAX. TRUSTS.	Property or money transferred to a trustee for the purpose of beautification and care of the graves of testator and his wife, is subject to Missouri inheritance tax.
57-55	Aug 9	CONSTITUTIONAL LAW. OSTEOPATHS. RENEWAL LICENSES. PROFESSIONS.	That part of Section 337.060, RSMo 1949, which gives the Missouri Association of Osteopathic Physicians and Surgeons the power to determine the educational programs which will be necessary for renewal licenses of osteopaths of Missouri, is unconstitutional and void.
57-55	Aug 29	LOTTERIES.	The Puritan Dairy "Knocking Man" scheme is a lottery prohibited by the laws of the state of Missouri.
58-55	Jan 5	FEDERAL SOLDIERS' HOMES. DEFINITIONS.	A woman is not entitled to admission to the Federal Soldiers' Home by virtue of being the mother-in-law of a former serviceman.
58-55	Feb 1	TOWNSHIP COLLECTORS. PERSONAL REPRESENTATIVE TO SETTLE ACCOUNTS, WHEN. DISPOSITION OF TOWNSHIP PERSONAL	Personal representative of deceased township collector to have charge of all books, accounts, money or other personal property of township in possession or control of collector at time of death. Personal representative to make final settlement of accounts with county court in same time and manner as collector personally, provided by Sec. 139.420, except personal representative not required to pay tax funds to county treasurer and ex officio collector, or make return of delinquent taxes to county court. He shall turn over possession and control of all such township books, accounts, money or other personal

		PROPERTY.	property to successor-collector less any legal fees earned during term and previously unpaid deceased.
58-55	Apr 7	STATE FEDERAL SOLDIERS' HOME OF MISSOURI. APPLICANTS FOR ADMISSION.	Persons may be admitted to the State Federal Soldiers' Home of Missouri who are citizens of Missouri and who were soldiers and sailors honorably discharged from the service of the United States who are in indigent circumstances, and who, from any disability not received in any illegal act are unable to support themselves by manual labor; the aged mother, wife or widow of such soldier or sailor; army nurses who served with the armies of the United States; and ex-members of the enrolled Missouri Militia who served 90 days or more in the field during the civil war.
58-55	June 15	FEDERAL SOLDIERS' HOME. STEP-MOTHER OF EX-SERVICEMAN INELIGIBLE FOR ADMISSION.	Step-mother of ex-serviceman eligible for admission to Federal Soldiers' Home of Missouri, is not the aged mother of ex-serviceman within the meaning of Section 212.140 RSMo 1949, and is not eligible for admission into home.
58-55	Sept 21	FEDERAL SOLDIERS' HOME. DONATIONS.	The Board of Trustees of the State Federal Soldiers' Home of Missouri is authorized to accept gifts of money or property from any source, including inmates of the Home. That the approval of the Governor is not necessary in the matter of the acceptance of the gift for the Home by the trustees.
58-55	Dec 13	SCHOOLS. SCHOOL DISTRICTS.	Where consolidated school district has voted bond issue with no specific location for construction of buildings having been submitted to voters and subsequently becomes part of enlarged district, board of enlarged district may locate site for construction of buildings anywhere within enlarged district.
59-55	Mar 30	CRIMINAL LAW. ARREST. SUMMONS. WARRANTS.	When a defendant voluntarily appears to answer a charge that he has committed a misdemeanor, and does not object to the failure of issuance of a warrant of arrest or summons against him, it is unnecessary to then issue as a matter of course such warrant of arrest or summons.
59-55	May 9	CROP FOREST LANDS. FORESTRY. TAXATION.	Person whose land has been classified as forest cropland may withdraw his land from such classification by paying the taxes owed thereon plus penalty equivalent to 5% interest less the amounts previously paid.
59-55	Aug 26	WORKMEN'S COMPENSATION. CORPORATIONS. CHARITABLE CORPORATIONS.	Fairfax Community Hospital, an incorporated, non-profit, charitable institution is an "employer" within terms of Missouri's Workmen's Compensation Law.

60-55	Feb 3	COUNTY COURTS. COUNTY FINANCIAL REPORTS.	County court may not obligate county by designating in December, 1954, newspaper in which county's financial report is to be published after January 1, 1955.
60-55	Mar 24	TAXATION. COUNTY BOARDS OF EQUALIZATION.	County boards of equalization not authorized to employ appraisers.
60-55	Apr 7	SCHOOLS. SCHOOL DISTRICTS. ELECTIONS.	In third class cities of less than ten thousand population, may have separate polling places for school election and municipal election.
60-55	May 12	SHERIFFS. JAILERS. COUNTY COURT.	(1) Circuit judge may authorize sheriff in counties of the third class to appoint a jailer to be paid from county funds; (2) the compensation of such jailer should not be included in the board bill for prisoners submitted to the county court, but should be shown as a separate item of expense; (3) Circuit court has no authority to authorize the sheriff to employ a cook; (4) The expense of cook hire may be paid by the county if such is reasonably incurred by the sheriff in boarding prisoners and should be included in the monthly board bill submitted by sheriff to county court.
60-55	Aug 29	KIDNAPPING.	Parent forcibly taking its child against will of person to whose custody child has been awarded by decree of court of competent jurisdiction is guilty of kidnapping under Sec. 559.240, RSMo 1949.
62-55	Jan 10	COUNTY HIGHWAYS. CITIES. COUNTY COURTS.	The county court of Marion County, Missouri, may legally authorize expenditures and expend county funds, within certain defined limits, for the purpose of construction, repair, improvement and upkeep of the streets of an incorporated municipality within the county boundaries, when such street forms part of a continuous highway of said county leading through the city or village; that a street, to form a part of a continuous highway of the county, must be a connecting link between two portions of a highway, which together form an uninterrupted line of traffic; that it is necessary that such street be a continuation of a county highway, and that it extend through and beyond the aforesaid city or village; that if a highway end at the city limits of a city or village, or if the city limit is the Mississippi River, a state line or a county line, money cannot be spent as aforesaid on the improvement of the aforesaid city street.
62-55	Feb 16	Hon. Harold L. Miller	WITHDRAWN
63-55	May 25	DEEDS. COUNTY RECORDER.	Deputy recorder of deeds may be made assignee for purpose of releasing notes by mortgage or deed of trusts.
63-55	Nov 14	Hon. J. Whitfield Moody	WITHDRAWN

64-55	Mar 2	COUNTIES UNDER TOWNSHIP ORGANIZATION. COUNTY TREASURER AND EX-OFFICIO COLLECTOR'S FEES.	In determining maximum amount to be retained by county treasurer in counties of the third and fourth class under township organization, all taxes, including current real and personal, are to be considered in determining bracket under Sec. 52.260, RSMo 1949.
64-55	June 13	MOTOR VEHICLE SAFETY RESPONSIBILITY ACT.	Director of Revenue shall suspend license and registration of persons failing to satisfy judgments arising from motor vehicle accidents subsequent to the effective date of an Act found in Laws of Missouri, 1945, page 1207.
64-55	Aug 16	MOTOR VEHICLES. DRIVER'S LICENSES. CHAUFFEUR'S LICENSES. OPERATOR'S LICENSES.	The Director of Revenue is authorized to report out-of-state convictions on the back of renewed operator's and chauffeur's licenses in the same manner in which convictions in Missouri are reported.
64-55	Aug 29	CRIMINAL LAW.	Under the provisions of Section 559.350, RSMo. Cum. Supp. 1953, a man may be charged and convicted for failure to support his children born out of wedlock notwithstanding the fact that he does not have the legal right to the care and custody of said child or children, and that paternity as an element of the offense, may be established in such criminal proceedings.
64-55	Oct 17	DEPARTMENT OF REVENUE. APPROPRIATIONS.	Appropriations from general revenue may be used to pay expenses of cigarette tax collection.
64-55	Dec 21	SALES TAX. PAPER UTENSILS.	The retailer of food and drink, which is sold upon the premises where served, should pay the sales tax upon any paper items in which such food and drink is served.
64-55	Dec 27	MOTOR VEHICLES. TEMPORARY INSTRUCTION PERMITS.	Director of Revenue unauthorized under Provisions of Section 302.130 RSMo Cumulative Supplement 1953, to issue temporary instruction permit to operate motor vehicle, until applicant has satisfactorily passed the eye and written examination required by Section 302.173 RSMo Cumulative Supplement 1953.
65-55	Sept 29	CLERK. PROBATE COURT. PROBATE COURT CLERK. OFFICERS. INCOMPATIBILITY OF OFFICES.	The offices of probate clerk and appraiser of an estate before the probate court are incompatible, and thus may not be held by the same person at the same time.

		INHERITANCE TAX.	
66-55	Feb 3	STATE PURCHASING AGENT.	The State Purchasing Agent does not have to obtain the approval of a state department, for which he is by law authorized to make purchases, before he issues purchase orders against funds of such department.
67-55	Jan 5	INSURANCE. FARMERS' MUTUALS.	Farmers' mutual insurance companies organized under, or accepting, the provisions of H.B. 249, 67th General Assembly are permitted to write "miscellaneous" coverage referred to in subparagraph 4, Section 4 of the Act only if the guaranty fund or policyholders' surplus of not less than \$400,000.00 is maintained.
67-55	Jan 21	CITIES. PARKING METERS.	(1) Receipts from parking meters may be used only for the purpose of purchasing, installing and maintaining such meters and enforcing regulatory ordinances in connection therewith; (2) Parking meter receipts should be, but are not necessarily required to be, carried in a separate fund by the city treasurer.
67-55	Feb 14	JURY COMMISSIONERS.	No statute for jury commissioners in Clay County.
67-55	May 5	COUNTY COLLECTORS (CLASS TWO COUNTIES). COMPENSATION.	Collectors of revenue in counties of the second class to be compensated under the provisions of Sec. 52.420, MoRS, Cum. Supp., 1953, and may not retain fees for collection of drainage or levee district taxes.
68-55	Mar 1	COUNTY HIGHWAY ENGINEERS. COUNTY SURVEYORS. COUNTY OFFICERS. FEES AND SALARIES.	A person serving in the dual capacity of county highway engineer and county surveyor in a county of the third class is entitled to compensation as county surveyor while engaged in making surveys needed to lay out a road, but is not entitled to the pay of a county highway engineer for the same service; the duties of a county highway engineer do not encompass the demolition of an abandoned courthouse, and, therefore, such person cannot be paid as county highway engineer for such work.
68-55	Aug 15	LEVIES. COUNTY HEALTH CENTER. RATES OF LEVY. TAXATION.	Senate Bill No. 286 requires the lowering of the levy voted for the establishment of a county health center; the proper body to lower the levy is the county court.
68-55	Oct 12	OSTEOPATHS. ADVERTISEMENTS.	An osteopathic physician can ethically and legally use a sign, by first placing his name and the letters D.O. behind it on one line, and underneath the words "physician and surgeon", and it is not necessary that he include the word osteopathic before the word physician.
68-55	Nov 17	SCHOOLS.	Senate Bill No. 286, 68th General Assembly, requires reduction in total

		SCHOOL DISTRICTS. TAXATION.	school levy but does not require that the rate for each purpose be reduced proportionately; in subsequent years board may file revised estimate at any time before original estimate is acted upon and thereby levy rate of taxation for each purpose less than but not in excess of that authorized by vote of the people.
68-55	Nov 21	SHERIFFS', DEPUTIES' MILEAGE.	The sheriff and his deputy may collect up to \$75. per month each for mileage in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense.
68-55	Dec 16	PROSECUTING ATTORNEYS. FEES.	The compensation provided for by Sec. 470.210 RSMo 1949, for prosecuting attorneys should be paid over by the prosecuting attorney to the county treasurer, and is not to be retained by the prosecutor.
69-55	Nov 30	SCHOOLS.	Official action of directors of consolidated district in levying school taxes, if according to applicable statutes is valid, although attested by illegally appointed secretary of board.
70-55	Jan 10	Hon. John P. Peters	WITHDRAWN
70-55	Mar 17	LOTTERIES.	A plan proposed to be operated where an individual operates an excursion boat, afternoons and evenings, and a charge of \$1.25 per person is collected for each excursionist on each trip, and to increase the number of patrons, the admission charge to remain the same, there is added a bingo game on the afternoon trip at which prizes would be won and awarded, is a lottery.
70-55	Sept 20	ASSISTANT PROSECUTING ATTORNEYS. INCREASED PERSONNEL IN COUNTY PROSECUTOR'S OFFICE. COUNTY BUDGET LAW.	County court is bound by Sections 56.150 and 56.160, RSMo 1949, as amended by the 68th General Assembly; mandamus will lie to compel county court to pay the increased salary of prosecuting attorney's employees, and the salaries of the increased number of prosecuting attorney's employees.
70-55	Nov 9	Hon. Richard K. Phelps	WITHDRAWN
71-55	Jan 27	COUNTIES. CIRCUIT CLERKS. RECORDERS. COUNTY COURTS.	Circuit clerk and ex-officio recorder of deeds in 3rd class county not permitted to retain fees collected under Section 451.150 and Section 193.350 RSMo 1949. Presiding judge of county court in third class county not to receive compensation under Sec. 3, H. B. 163, 67th General Assembly, for additional duties prescribed by such law if such duties are performed subsequent to December 31, 1954.

71-55	Feb 7	COUNTIES. COUNTY FINANCIAL REPORT.	County court authorized to publish financial report in only one newspaper at county's expense.
71-55	Oct 3	PUBLIC ROADS. PRESCRIPTION.	Public road may be established when such road has been continuously used by the public for a minimum period of ten years, and upon which there shall have been expended public money or labor for such period to the extent that such road has been kept in substantial repair and condition for the public use and public travel.
71-55	Nov 14	AGRICULTURE. ICE CREAM. FROZEN FOODS.	Review of proposed rules and regulations of the Department of Agriculture implementing House Bill No. 257 of the 68th General Assembly.
71-55	Nov 22	OFFICERS. ASSESSOR. COUNTY HIGHWAY COMMISSIONER.	Duties of the office of county highway commissioner are not repugnant or incompatible with those of the county assessor and that one person may hold both offices at the same time.
72-55	Jan 27	COUNTY ASSESSORS. COUNTIES.	Annual compensation of county assessor in third class county computed on fee basis until commencement of next year of his incumbency after effective date when county's classification changes from third class to second class, at which time he will receive an annual salary as provided by Sec. 53.120, RSMo. 1949. Such assessor's deputies to be compensated under Sec. 53.090 from date such assessor's compensation is changed.
72-55	Feb 16	COUNTIES. SHERIFF.	Sheriff of county whose classification changes from third to second class during his term shall not continue to act as assistant probation officer nor receive compensation therefor after such change in classification.
72-55	Mar 3	CITIES OF THIRD CLASS. COMMISSION FORM OF GOVERNMENT. CITY LIBRARIES.	Sections 78.060 and 78.070, RSMo 1949, control the administration and management of city libraries in cities of the third class operating under the commission form of government.
72-55	Apr 18	COUNTY AUDITOR. COLLECTOR OF REVENUE. LEVEE DISTRICTS.	Respective duties of county auditor and collector of revenue in class 2 counties in regard to levee district taxes.
72-55	June 14	STATE BOARD OF COSMETOLOGY.	1. Fees collected by Board payable to Director of Revenue; 2. No prohibition against employee of Board discharging duties of an inspector and secretary at the same time if, in Board's discretion, action is conducive to efficient operation. 3. An officer of this state may authorize an increase in salary to an employee different from that

			listed in the official Manual. 4. Board may not grant bonuses to employees. 5. Employees of Board may travel beyond State and receive reimbursements therefor, if such expense is incurred in discharge of official duties, in matter in which government has an interest, and within appropriation provided for that purpose.
72-55	June 17	SCHOOLS. SCHOOL DISTRICTS. TAXATION. CONSTITUTIONAL LAW.	School district governed by three directors, but containing within its boundaries incorporated village, may levy a tax of one dollar on the \$100 assessed valuation without a vote of the people. Elections conducted under laws applicable to common school districts.
72-55	Aug 1	REPRESENTATIVES. APPORTIONMENT. CONSTITUTION.	The apportionment of representatives is according to the last decennial census of the United States and representatives cannot be apportioned according to any census taken by any county, nor can the representation of a county be increased prior to the next United States census by an act of the Legislature or otherwise.
72-55	Aug 1	Hon. Paxton P. Price	WITHDRAWN
72-55	Aug 9	LIBRARIES. TAXATION. RATES OF LEVY.	Senate Bill No. 286 requires county courts or city councils to reduce library tax rates but does not make mandatory such reductions in rates which would prevent a library from receiving state aid under Section 181.060.
72-55	Nov 17	GRAND JURIES.	Grand jury in Clay County selected by sheriff or board of jury commissioners in accordance with judge's direction.
73-55	Feb 9	MISSOURI TURNPIKE AUTHORITY.	Senate Bill #206 would not impose any obligation upon the state for Turnpike Authority debts.
73-55	Mar 10	DIVISION OF MENTAL DISEASE. ELEMOSYNARY INSTITUTIONS.	Applicable rules for determination of eligibility for employment by Division of Mental Diseases of members of American Friends Institutional Service Unit.
73-55	Mar 21	Hon. B. E. Ragland	WITHDRAWN
73-55	Aug 15	Hon. B. E. Ragland	WITHDRAWN
74-55	Mar 1	Mr. W. H. Burke	WITHDRAWN
74-55	May 3	MAGISTRATE & CIRCUIT COURTS. THIRD AND FOURTH CLASS COUNTIES. DELINQUENT AND NEGLECTED CHILDREN.	Prosecuting attorneys in third and fourth class counties are authorized to file a complaint of neglected or delinquent children in either circuit or magistrate court. Likewise, the sheriff is authorized to file such a complaint in a magistrate court. Sheriffs of such counties having a county superintendent of public welfare or a probation officer, automatically become assistant probation officers without necessity of appointment.

		DIVISION OF WELFARE.	
74-55	May 31	SCHOOLS. SCHOOL DISTRICTS. ELECTIONS. STATE AUDITOR. POLITICAL SUBDIVISIONS.	Election officials in school bond elections may be prosecuted for fraud; ballots cast in school bond elections may be recounted only in case of grand jury investigation and in trial of civil or criminal cases in which violation of election laws is under investigation or at issue; oath of officials in school bond election held on day other than day of annual meeting administered by any official authorized to administer oaths; financial statement required to be published annually in certain school districts; school district political subdivision so as to require State Auditor to make audit upon request of five per cent of voters.
74-55	Sept 30	Hon. James R. Reinhard	WITHDRAWN
74-55	Oct 19	SHERIFFS. SHERIFFS' FEES. FEES. COSTS. CRIMINAL COSTS.	Sheriff is not entitled to fees from the county for services in criminal matters.
75-55	Aug 29	SCHOOLS. SCHOOL DISTRICTS. TAXATION.	Where territory of school district in one county extends into another county and assessed valuation of latter county is increased by more than ten per cent after rate of levy has been determined, school board must redetermine rate of levy in accordance with Senate Bill No. 286, 68th General Assembly.
76-55	Feb 17	CORPORATIONS. FRANCHISE TAX. TAXATION.	Upon submitted facts, the entire assets of a domestic corporation named, are subject to Missouri franchise tax.
76-55	Apr 12	MICROWAVE STATIONS. STATE TAX COMMISSION.	Microwave stations owned or controlled by the American Telephone and Telegraph Company, and the Southwestern Bell Telephone Company, are not distributable property of a public utility to be assessed by the State Tax Commission, but constitute property to be locally assessed under Section 151.100, RSMo 1949.
76-55	June 10	TAXATION AND REVENUE. STATE TAX COMMISSION.	Method of apportioning distributable property of pipeline companies.
76-55	June 15	ASSESSMENT OF PROPERTY.	1) Partially completed buildings or other structures on real estate are subject to ad valorem assessment; 2) Partially completed structures on real estate should be assessed against and in the name of the owner of land as real property; 3) Materials purchased by the owner for construction of a building which have not been used by the contractor,

			and have not yet become a part of the building, or a part of the realty, should be taxed in the name of the owner; 4) The assessment of buildings or other improvements under construction, as in our answer to question No. 2, should be assessed in the name of the owner as real property.
76-55	June 17	Hon. James M. Robertson	WITHDRAWN
77-55	Feb 1	DIVISION OF FINANCE.	Proposed agreement may conflict with Section 362.170, RSMo 1949.
77-55	Apr 29	CREDIT UNIONS.	Proposed plan to separate and exchange accounts of two credit unions may not be carried out in view of Section 370.340 RSMo 1949 which specifically covers expulsion and withdrawal of members.
77-55	Aug 12	BANKS. TRUST COMPANIES. CORPORATIONS.	Banks and Trust Companies liable for incorporation fees, and fees upon increase of stock, as required by Section 351.065 RSMo 1949.
77-55	Aug 23	BANKS. HUSBAND AND WIFE.	Loan limit of bank to any one person set forth in Sec. 362.170 RSMo 1949 not violated by husband and wife giving their individual notes so long as note given by each does not exceed amount prescribed by said statute; and pledging of collateral owned as tenants by entirety does not make such loans in single "joint obligation."
79-55	Jan 19	STOCK LAW. ELECTIONS. TOWNSHIPS. VOTING.	Proposition to invoke stock law by entire county under Sec. 270.090, RSMo 1949, requires merely a majority of the voters voting on the proposition. Where proposition to enforce stock law carries at county-wide election, the stock law is in effect county wide in spite of fact that identical proposition submitted simultaneously at separate township election was defeated in some of the townships.
79-55	Feb 10	Hon. J. E. Schellhorg	WITHDRAWN
79-55	May 9	Hon. J. B. Schnapp	WITHDRAWN
79-55	Oct 17	COUNTY COURT. ASSESSOR.	Prior to October 9, 1951, there existed no legal authority under which the county court could pay from county funds the compensation of clerical assistants in the office of assessor for services performed prior to said date.
80-55	Feb 23	SOCIAL SECURITY. COUNTY COURT.	County court has discretion under Section 105.350, Vernon's Annotated Missouri Statutes, to submit a plan for approval by the state agency under said act.
80-55	Apr 21	COSTS. VENUE. DEPOSIT.	The change of venue fee required by Section 508.220, RSMo 1949, should not be returned to the county where the case originated, upon return of the case, by stipulation of the parties, to the county of origin.

		COURTS. CIRCUIT CLERK. FEES.	
80-55	May 16	ROADS. FOURTH CLASS, NON- TOWNSHIP ORGANIZATION COUNTIES. SPECIAL BENEFIT ASSESSMENT DISTRICTS. COMMISSIONERS' POWERS.	County Court of fourth class non-township organization county can employ county highway engineer by following procedure provided by Section 61.160 RSMo Cumulative Supplement 1953. Attempted action of county court of such class county to employ an engineer by contract and pay compensation other than that authorized by section is void. Board of Commissioners of special benefit assessment road district of non-township organization county, organized under provisions of Secs. 233.170 to 233.315 RSMo 1949, is authorized on behalf of district, to receive any funds which may be paid by Federal Government as damages to district's roads.
80-55	Oct 10	Hon. Rufe Scott	WITHDRAWN
80-55	Dec 1	FELONIES. PRELIMINARY EXAMINATIONS. CONTINUANCES.	If it be impractical to conduct an immediate preliminary examination in felony cases, Supreme Court Rule 23.06 provides that an "adjournment shall be allowed either to the prosecution or to the accused for the purpose of procuring the attendance of material witnesses, and for any other good and sufficient cause."
81-55	Jan 27	ANIMALS. STOCK LAW.	Horses owned by a resident of a township which has not voted to enforce the provisions of Chapter 270, RSMo 1949, to restrain animals from running at large may be restrained under said Chapter if such animals go into a township which has voted to come under the stock law and break the enclosure of a resident of that township. Under Chapter 271 they may be dealt with as strays. The sheriff is a proper and authorized person to enforce the terms of said Chapter 271 when animals are running at large in violation of the stock law, under said Chapter 270, and have been deemed to be strays.
81-55	Feb 3	Hon. D. W. Sherman, Jr.	WITHDRAWN
81-55	June 3	SCHOOLS. REFORMATORIES. STATE BOARD OF TRAINING SCHOOLS.	Boy committed to custody of State Board of Training Schools may be transferred to Algoa without being physically present at Training School at time of transfer.
81-55	Sept 21	TRAINING SCHOOLS. STATE BD. OF TRAINING SCHOOLS. DELINQUENT CHILDREN.	Not duty of State Board of Training Schools to prepare and present pre-sentence investigations of allegedly delinquent children or to supervise children found to be delinquent, unless such children are committed to institutions under control of Board.
81-55	Oct 20	SCHOOLS.	An elementary pupil of a closed school district, which district was

		SCHOOL DISTRICTS. DEPARTMENT OF EDUCATION. BOARD OF EDUCATION.	closed by the State Board of Education and required to provide for the transportation of its pupils under Section 161.120 RSMo 1949, who attends a school in another district without conferring with the Board of Education of the home district, as to where he should attend school, is voluntarily attending such other district and the sending district does not have to pay the tuition and transportation costs of such elementary pupil when it has provided for tuition and transportation expenses to a district other than the one the pupil is attending.
82-55	Jan 6	COMMISSIONER OF AGRICULTURE. FAIRS AND SHOWS.	The Commissioner of Agriculture may not make cash payments to non-profit agricultural societies for the purpose of defraying the expenses of representatives of those societies to the annual convention of the Missouri Association of Fairs.
83-55	Jan 7	CIVIL DEFENSE. POLITICAL SUBDIVISIONS.	Official of political subdivisions authorized to sign project applications for federal contributions to Civil Defense Program is chief executive officer of political subdivision and not local civil defense director.
83-55	Mar 25	CIVIL DEFENSE. COUNTIES. COUNTY BUDGET LAW. POLITICAL SUBDIVISIONS.	Authorization of state to request advance of funds from federal government for cost of civil defense equipment.
84-55	Feb 28	ELECTIONS. SCHOOLS. COUNTY SUPERINTENDENT OF SCHOOLS.	Declaration of candidacy for the office of county superintendent of schools filed at 11:00 A.M., on February 19, 1955, is within time prescribed by Sec. 167.020, RSMo 1949.
84-55	Sept 7	FEES AND SALARIES. JUVENILE COURT. COSTS. FEES. PROSECUTING ATTORNEY. DELINQUENT CHILDREN. NEGLECTED CHILDREN.	(1) Since a juvenile court proceeding is not "of a criminal nature", a prosecuting attorney may not collect the five dollar fee allowed in Section 56.310, RSMo 1949, for "judgments upon any proceedings of a criminal nature;" but he shall be allowed the five dollar fee as provided in Section 56.310, "for his services in all actions which it is or shall be made his duty by law to prosecute or defend" (2) Juvenile court costs according to Section 211.380, RSMo 1949, may be assessed in the court's discretion against either the "petitioner, or any person or persons summoned or appearing," or against the county.
85-55	Jan 18	MAGISTRATES. PROBATE JUDGES.	Section 481.140, RSMo 1949, relating to the power of the members of the county bar to elect a probate judge, and Section 482.120, relating to the power of a circuit judge to appoint a magistrate, in case of disability, are both rendered null and void by Section 6 of Article V of the Constitution of Missouri, and by Supreme Court Rule 11.05.

85-55	Apr 12	RECOGNIZANCES. BONDS. CONTINUANCES.	Where a criminal case is continued generally by the court the recognizance is still in effect and persons signing the recognizances may be held thereon.
85-55	June 14	SCHOOLS. TEACHERS. CORPORAL PUNISHMENT.	A teacher has the right to inflict corporal punishment upon a pupil if such punishment is necessary to maintain order and discipline in the school; such punishment must be reasonable and proper under all of the conditions and circumstances existing; it must not be excessive, cruel, unusual, or malicious.
85-55	July 6	INHERITANCE TAXES. APPRAISER'S HEARINGS. PROSECUTING ATTORNEY'S ATTENDANCE.	Prosecuting Attorneys of each county of the State are required, under provisions of Section 145.270, RSMo 1949, to attend all inheritance tax appraiser's hearings held in his county.
86-55	Feb 3	LIQUEFIED PETROLEUM GAS. DRUMS. TRANSPORTATION. INSTALLATION.	Neither Section 2 of Senate Bill No. 179, 64th General Assembly nor Basic Rule B.15 respecting the handling of liquefied petroleum gas prohibit the transportation of such drums, either empty or containing gas, on the highways of this State.
86-55	May 31	Hon. Lyndon Sturgis	WITHDRAWN
86-55	Sept 8	COUNTY COLLECTORS.	Limitation on amount of commission of ex officio collectors in township organization counties in Section 52.270, RSMo 1949, not unconstitutional.
86-55	Sept 8	SCHOOLS. SCHOOL DISTRICTS. TAXATION.	School districts affected by Senate Bill No. 286, 68th General Assembly, should not revise estimates and tax levies until after October 4, 1955.
86-55	Nov 22	PROSECUTING ATTORNEYS. TAXATION. FEES.	The fees allowed the attorney for the collector under the provisions of Section 140.740, RSMo Cum. Supp. 1953, should be taxed as costs in suits brought by the prosecuting attorney in a county of the second class on delinquent tangible personal property tax bills and that such fees when received by the office of the prosecuting attorney should be turned over to the county treasury at the end of each month as provided in Section 56.340, RSMo 1949.
86-55	Dec 29	PRIVATE CARRIERS. PUBLIC SERVICE COMMISSION PERMITS.	A manufacturing company that transports its own products in furtherance of its business is a private carrier.
87-55	Oct 24	COMMITTEEMAN. COMMITTEEWOMAN.	A township committeeman or committeewoman who accepts an award of money for inducing any other person or persons to vote in any

		VOTERS. REWARDS.	election is guilty of a misdemeanor and can be punished by imprisonment in the county jail for not less than one month nor more than one year, and the accepting of such an award for doing such acts is illegal.
89-55	Feb 21	TAXATION. DELINQUENT TAXES.	Treasurer and ex-officio collector of county of third class under township organization is not required to collect delinquent taxes of city of fourth class.
89-55	Sept 6	Hon. William E. Tipton	WITHDRAWN
89-55	Nov 29	SPECIAL ELECTION. ELECTIONS. SENATE JOINT RESOLUTION NO. 9, 68TH GENERAL ASSEMBLY.	In the legal notices published prior to the January 24, 1956 election call by the Governor, it must be designated a "special election."
90-55	Mar 23	CHATTEL MORTGAGE. MOTOR VEHICLE. CERTIFICATE OF TITLE.	A Recorder of Deeds has no statutory or other authority to defer the endorsement on a certificate of title to a motor vehicle the date of the filing of a chattel mortgage on such motor vehicle to a later date and back date the date of the endorsement on such certificate of title to make it appear to have been made on the same date of the original filing of such chattel mortgage.
90-55	May 26	SPECIAL ROAD DISTRICTS. TOWNSHIP ORGANIZATION.	(1) Special road districts in county under township organization may be formed under the provisions of Secs. 233.320-233.445, RSMo 1949. (2) Duties of county court in such county with respect to petition for formation of such special road district.
90-55	Nov 17	COUNTIES. COUNTY COURTS. REVENUE BONDS. HOSPITALS. COUNTY HOSPITALS.	Money derived from the sale of bonds authorized by a special election must be used for the specific purpose stated on the ballot and for no other.
92-55	Aug 15	COUNTY HEALTH CENTER. RATES OF LEVY. TAXATION. LEVIES.	1) Senate Bill No. 286 requires a reduction in the rate of levy for county health center purposes and such rate is to be reduced by the county court. 2) Only public schools and libraries are specifically given exception from the operation of Senate Bill No. 286, in regard to participation in state funds. 3) In years when Senate Bill No. 286 is not applicable, the originally authorized rate goes again into effect.
93-55	Jan 27	COUNTY BOARD OF ZONING ADJUSTMENT. FIRST CLASS COUNTY.	In deciding contested cases the board of zoning adjustment in first class counties must make findings of fact and conclusions of law.

93-55	Feb 17	TAXATION.	Sales tax on cigarettes contemplated by H.B. No. 18 is not unconstitutional as amounting to "double taxation."
93-55	Mar 24	SCHOOLS. SCHOOL DISTRICTS. ELECTIONS.	Requirement of separate polling place in each incorporated city or town in school district mandatory before election.
93-55	Mar 30	STATE TAX COMMISSION. ASSESSMENT OF PROPERTY. INCREASE OF ASSESSMENT.	Order of the State Tax Commission increasing the assessment of property in certain counties so as to bring such assessment up to 30% of the true value does not violate the Missouri Constitution or the provisions of Section 138.390, RSMo 1949.
93-55	July 20	SALARIES. OFFICERS. CITY OF ST. LOUIS. LIMITATIONS. RECORDERS OF DEEDS.	The salary of the Recorder of Deeds of the City of St. Louis is fixed by the General Assembly at \$6,750 per annum, and that the present Recorder is entitled to receive that amount of salary which he should have received since taking office, except that portion due more than five years prior to institution of suit.
93-55	Aug 9	Hon. Wayne W. Waldo	WITHDRAWN
93-55	Oct 10	MOTOR VEHICLES. HIGHWAY PATROL. SCHOOL BUS.	A person under twenty-one years of age operating a school bus transporting ten or less pupils is required to have a chauffeur's license unless said school bus is owned by the U.S., State of Missouri, Municipality or political Subdivision of the State, which includes school district, in such case the operator need only have an operator's license. If said school bus transports more than ten pupils regardless of ownership, if the operator is under 21 years of age, he is required to have a chauffeur's license. A person 18 years of age duly licensed as a chauffeur may operate a school bus regardless of the number of pupils carried.
94-55	Jan 5	INTOXICATING LIQUOR. NONINTOXICATING BEER. ADVERTISING.	There is no legal prohibition against a manufacturer making and leasing to any store licensed to sell intoxicating beer, a metal beverage cooler containing a metal superstructure upon which will be colored pictures of the products contained in the cooler, such a milk, soft drinks, intoxicating liquor or nonintoxicating beer, from which the customer may help himself, such intoxicating liquor or nonintoxicating beer not to be consumed on the premises.
94-55	May 11	Hon. Charles A. Weber	WITHDRAWN
94-55	July 6	SCHOOLS. TITLE.	School District has not abandoned school building and premises so long as it continues to use same for storage of books, desks, and property

			belonging to the district, and other related uses.
96-55	Jan 19	SALES TAX. CLASSIFICATION OF SALES TAX AS DEMAND AGAINST ESTATES. ESTATES. DECEDENTS' ESTATES.	Amounts due from decedent for sales tax collected by him should be classified as a demand of the third class rather than as a fifth class demand, but administrators should pay such amounts without demand.
96-55	Jan 21	MOTOR VEHICLES. FARM TRACTORS. DRIVER'S LICENSE.	(1) "Farm tractor" exempted from registration law only to extent authorized in Sec. 304.260, RSMo 1949; (2) Farm tractor operated on public highway must conform to all traffic and equipment regulations; (3) Operator's or chauffeur's license required to operate farm tractor in nonexempt use; and (4) Farm wagon exempt from registration.
96-55	Feb 3	CORONERS.	Coroner should file report of findings or inquest with county clerk and also with circuit clerk when required by Section 58.350, RSMo 1949.
96-55	May 13	SCHOOL ELECTIONS. COUNTY SUPERINTENDENTS. VOTING PLACES. REGISTRATIONS.	The board of directors of a city school district at a school election held separate and apart from a municipal election, at which a county superintendent of schools is to be elected may fix a single voting place where voters of the district may cast their ballots, or if such election is held in conjunction with a municipal election on the same date, the board may designate voting places for the casting of ballots in said election in the residential wards and precincts of the voters of such city. All voters residing in a city of the third class having a population of not less than 10,000 nor more than 30,000 inhabitants are not required to be registered to vote for county superintendent of schools when board has designated a single voting place, under terms of Section 165.330, RSMo 1949.
96-55	May 23	Hon. Hubert Wheeler	WITHDRAWN
96-55	June 8	COUNTY HOSPITALS.	Four questions relating to duties of boards of trustees of county hospitals.
96-55	June 15	STATE BOARD OF EDUCATION. SOCIAL SECURITY. VOCATIONAL REHABILITATION.	House Bill No. 202, 68th General Assembly, authorizes State Board of Education to formulate and execute plan of agreement in carrying out provisions of Federal Social Security Act in making determination of disability under Title II thereof. State Board has authority to designate Vocational Rehabilitation Section to administer such plan.
96-55	July 27	COUNTY SURVEYORS.	(1) County surveyors to make surveys under Sec. 60.120 RSMo 1949 "when called upon," but not to exclusion of other competent surveyors. (2) Sec. 60.170 RSMo 1949 imposes mandatory duty on county surveyor to make surveys on "orders of survey." (3) Only

			surveys made by county surveyor entitled to become part of official "record of surveys" required under Sec. 60.340 RSMo 1949. (4) Willful and malicious destruction of landmarks is misdemeanor under Sec. 560.530 RSMo 1949. (5) Surveying of corner in decayed or perishable condition under Sec. 446.010 RSMo 1949 may be accomplished by one other than county surveyor. (6) Surveys under procedure set forth in Secs. 446.040 to 446.170 RSMo 1949 to be accomplished only by county surveyor. (7) Neglect to make surveys and plats required by Sec. 137.185 RSMo 1949 constitutes misdemeanor under Sec. 137.190 RSMo 1949. (8) Right to make surveys under Sec. 137.185 RSMo 1949 not exclusive right of county surveyor unless same are made pursuant to "orders of survey" issued by county court or city council of city, town or village.
96-55	Oct 24	PROSECUTING ATTORNEY'S COUNTY HOSPITAL DEPOSIT FEES.	It is the duty of the prosecuting attorney to institute and collect accounts due a county hospital; the \$5 deposit in Magistrate Court is not required to be made when suits are filed to collect accounts due a county hospital.
97-55	Dec 7	TAXATION. TAX SALE. COUNTY COLLECTOR.	(1) A publication of notice requisite to the sale of lands for taxes directed merely to the "heirs of" a certain person which notice does not contain the names of the record owners or the names of all persons appearing on the land tax book is insufficient and would render a sale based thereon invalid. (2) When, prior to conveyance, a sale of lands for taxes is discovered to be, for any reason, invalid the purchase money and interest thereon shall be refunded to the purchaser of the county treasury. (3) The costs and expenses incurred in connection with the sale of lands for taxes which sale is later determined to be invalid cannot be charred against the purchase money in the hands of the county.
99-55	Feb 11	COUNTIES. COUNTY PARKS. BONDED INDEBTEDNESS. COUNTY PROPERTY.	(1) County of third class has power to issue bonds for acquisition of land for park purposes, and (2) County of third class has power to convey land acquired from proceeds of bond issue to instrumentalities of the State of Missouri for a valuable consideration.
99-55	July 27	CRIMINAL LAW. REPEAL OF RSMO 1949 CRIMINAL STATUTES. SENATE BILL NO. 27 68TH GENERAL ASSEMBLY. PROCEDURE.	Criminal cases pending in Circuit Court charging defendants with larceny, embezzlement, and obtaining money under false pretenses under RSMo 1949, in effect at time crimes were alleged to be committed, but repealed by Senate Bill No. 27 of the 68th General Assembly giving new definitions of said offenses. Cases shall be tried on charges filed under RSMo 1949. If punishment for such crimes is less under Senate Bill No. 27 than under RSMo 1949, each defendant convicted before effective date of bill on August 29, 1955, but judgment not rendered until subsequently, said judgment shall be in

			accordance with applicable provisions of bill.
99-55	Aug 3	VOTER REGISTRATION. SENATE BILL NO. 297.	Persons who are registered prior to July 1, 1955, in cities covered by Senate Bill No. 297 are not obliged to reregister by Section 116.040, RSMo 1949.
99-55	Sept 26	INSANE PERSONS.	Subparagraph 3, Section 7, S.B. No. 59, 68th General Assembly provides mechanics for extending proceeding for temporary, emergency confinement under Secs. 5 or 6 of Act into formal judicial proceeding for involuntary hospitalization under Sec. 3 of Act. Court appointing examining physicians under Sec. 3 of Act may appoint physicians of own choosing except when patient confined in municipal hospital, when physicians must be members of staff of municipal hospital. Act contains no provision authorizing state hospital to condition giving of voluntary hospitalization to indigent persons only after hearing and commitment. Line 3, Sec. 8 of Act should be so read as to employ punctuation by use of a comma immediately after the word "court" appearing therein.
99-55	Nov 17	Hon. James E. Woodfill	WITHDRAWN
99-55	Dec 27	TOWN OR VILLAGE. COLLECTORS. TAXES.	It is the duty of the town or village collector to collect those taxes levied by the board of trustees of an incorporated village or town that lies partly within the boundaries of the fourth class county.

COUNTY COURTS: The County Court of Holt County, Missouri
ROADS AND STREETS: has the authority to spend county money
for a right of way inside the city limits
of Mound City for a road to be taken over
by the state.

January 5, 1955



Honorable Clayton Allen
Senator, 17th District
Rock Port, Missouri

Dear Senator Allen:

Your recent request for an official opinion reads as follows:

"I wish you would please give me your opinion, as to whether or not the County Court of Holt County, Missouri has the right to spend County money for a right of way inside the city limit of Mound City for a road, to be taken over by the State. The County Court of Holt County has requested me to secure this opinion from you."

On April 9, 1949, this department rendered an opinion, a copy of which is enclosed, to Honorable E. Wayne Collinson, prosecuting attorney of Greene County, in which we held that "money derived from road and bridge tax on property not in special road district plus one-fifth derived from property in special road district may be spent by county court in improving or repairing streets in incorporated city in county if said street forms a part of the continuous highway of said county leading through such city."

You will note that the above opinion holds that under the circumstances set forth in the opinion money in the amount set forth in the opinion may be spent in "improving or repairing" the streets of a city when such streets form a part of a continuous highway of such county. Your question, however, is whether a county court may spend money within a city in the county for a "right of way" when such "right of way" will form part of a continuous road system of the county when such road is to be taken over by the state.

Hon. Clayton Allen

In this regard we direct your attention to Section 227.170, RSMo 1949, which reads as follows:

"Any civil subdivision as defined in section 226.010 RSMo 1949, shall have the power, right and authority, through its proper officers, to contribute out of funds available for road purposes all or a part of the funds necessary for the purchase of right of ways for state highways, and convey such right of ways or any other land to the state of Missouri to be placed under the supervision, management and control of the state highway commission for the construction and maintenance thereupon of state highways and bridges. Funds may be raised for the purpose of this section in such manner and such amounts as may be provided by law for other road purposes in such civil subdivisions; provided, that there shall not at any time be any refund of any kind or amount to said civil subdivision by the state of Missouri for lands, acquired under this section."

Said Section 227.170, RSMo 1949, was Section 8779, RSMo 1939, and was also Section 8131, RSMo 1929.

The term "through its proper officers" as used in Section 227.170, supra, would, in this regard, mean the county court.

We also call attention to Subsection (1) of Section 226.010, RSMo. 1949, which reads:

"(1) 'Civil subdivision,' a county, township, road district or other political subdivision of the state or quasi public corporation having legal jurisdiction of the construction and maintenance of public road;"

We now see that Section 227.170, supra, in the light of subsection (1) of Section 226.010, supra, and our understanding of the term "through its proper officers," means that counties (being a civil subdivision) have the authority through its county court to "contribute out of funds available for road purposes all or a part of the funds necessary for the purchase of right of ways for state highways, and convey such right of ways * * * to the State of Missouri * * * *."

Hon. Clayton Allen

This section 227.170, supra, was (when it was Section 8131) construed by the Missouri Supreme Court in the case of Reilly v. Sugar Creek Township of Harrison County, 139 S.W. 2d. 525. We believe that the above case is in point here and that the principles laid down and the decision announced in it were based upon conditions so nearly similar to those in the instant case that it will be decisive here. In that case the court discussed the law and facts which constituted the background of the enactment of certain provisions respecting the establishment and maintenance of county and state highways including a constitutional amendment which was adopted in 1928, whereby the sum of 75 million dollars in bonds was voted for road purposes. That was a case where a township had voted bonds for the purpose of paying for the right of way of highways in a certain township as expressed in said Section 8131, RSMo. 1929. As against all objections raised to the right of the township to vote the bonds from which to realize funds for such purpose, and the further objection that the payment of damages under condemnation proceedings in obtaining the right of way was not authorized to be paid out of said funds derived from such bonds, the court held that the township did have such rights as a civil subdivision. The court quoted verbatim, in its discussion of the case, said Section 8131, and after discussing the various amendments made to the statutes succeeding such amendment to the Constitution in voting such bonds in 1928, the court, in approving the use of such funds to purchase rights of way, which the court said were available for road purposes and were the property of the township as a civil subdivision, and could be contributed, at l. c. 527, said:

"* * * This amendment expressly authorized the construction of supplementary state highways in each county of the state in addition to the state highways designated in the act of 1921. See section 44a, article 4, Missouri Constitution, Mo. St. Ann.; State ex rel. Huff, supra. After the above amendment to the constitution, the legislature enacted section 8131, supra. See laws of 1929, page 226. By the constitutional amendment the state highway commission was granted a voice in the location of the roads and was given the power to '* * * determine the width of right of way and surface, and the type and character of construction, improvement, and maintenance.' The purpose of these provisions in the constitution was not only to establish a uniform system as to width,

Hon. Clayton Allen

etc. but also to insure continuous roads from one county to another. These supplementary roads are therefore under the supervision of the highway department and are termed state highways. In this undertaking the state lifted a heavy burden from the local communities, such as counties, townships and road districts. It is evident, however, that neither the act of 1921, or the constitutional amendment of 1928, restricted the authority of the state subdivisions to raise funds for road purposes. On the contrary the legislature in 1929, by the enactment of section 8131, supra, expressly authorized the local subdivisions to pay for rights of way. This, not without good reason, because these supplementary roads are primarily for local use. The local communities were given a voice in the location of these roads. As noted above, the act of 1927 authorized the construction of 'farm-to-market roads.' The 'farm-to-market roads' mentioned in that act are, as a matter of fact, now being built as supplementary state highways under the constitutional amendment of 1928."

Section 230.110 as well as said Section 227.170, RSMo 1949, provides that the State Highway Commission is authorized by law, when it so desires, to take over all or any part of the county highway system and the county highway commission is authorized by proper deed of conveyance to transfer to the State Highway Department that part of the county highway system so taken over.

Said Section 8131, RSMo 1929, was amended by Section 227.170, RSMo 1949, by changing the word "chapter" to "section." Otherwise it is the same as Section 8131, supra.

Conclusion

It is the opinion of this department that the county court of Holt County has the authority to spend county money for a right of way inside the city limits of Mound City on a street which forms a part of a continuous county highway of said county, for a road to be taken over by the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:mw

Enc. 4/9/49 to E. Wayne Collinson

ADJUTANT GENERAL: Not necessary that application for soldiers' bonus be filed on blank furnished by Adjutant
SOLDIERS' BONUS: General, but informal letter will suffice.



January 27, 1955

Major General A. D. Sheppard
Adjutant General of Missouri
Jefferson City, Missouri

Attention: Richard F. Shelley
Captain, AGC, MONG
Administrative Assistant

Dear General Sheppard:

This is in response to your request for opinion received from your office dated December 29, 1954, which reads as follows:

"On page 653 of the Laws of Missouri, Sixty Sixth General Assembly, Section 9 - Payments to be made, how--rejected claims may be heard again, it is therein stated as to the deadline for filing the applications for a Missouri Soldiers' Bonus, World War I.

"This office respectfully requests an opinion as to whether or not an informal application such as exhibit 'A' attached can be accepted as meeting the deadline of 31 December 1954, rather than having an actual application form on hand. Many letters are being received each day from persons applying for the bonus from out-state and from other states which will not be completely processed by 31 December 1954. The Federal government in all claims from veterans will consider an application as being filed and continue to hold the claim open upon receipt of such a letter as exhibit 'A'.

"We have also attached a copy of the application blank (exhibit 'B') for additional information."

Major General A. D. Sheppard

Attached to your letter of request is a typical letter from an applicant for soldiers' bonus, which letter is as follows:

"I wish to make application for the Missouri bonus for World War 1 Veterans.

"My name is * * * and my service number is * * * and I was a private S.A.T.C. first district Normal School, Kirksville, Missouri.

"I was enlisted or inducted October 8, 1918 at Shelbyville, Missouri, and was discharged December 17, 1918. My Commanding Officer was * * *.

"It is my understanding that the request for this bonus must be made on or before December 31, 1954.

"Your assistance in this matter will be greatly appreciated.

"Thanking you and awaiting your reply, I am

* * * *

The law upon which your request is based, found in Laws of Missouri, 1951, page 653, reads, in part, as follows:

"Section 9. Payments to be made, how - rejected claims may be heard again. - It shall be the duty of the Adjutant General to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payments shall be filed with the Adjutant General on or before December 31, 1954, and at such place or places as the Adjutant General may designate and upon the blanks furnished by the Adjutant General. The Adjutant General shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act. * * *"

Major General A. D. Sheppard

In construing statutes it is basic, requiring no citation of authority, that the intent of the Legislature must be ascertained. It is apparent from the fact that this act has been extended so many times and from its wording that the Legislature intended for every eligible veteran of World War I to receive a bonus. At the same time it is equally as apparent that the Legislature deemed it desirable to set a cutoff date after which applications for bonus could not be made.

Under the above law the Adjutant General is given wide discretion in determining the place or places at which applications for payment should be filed and in preparing the blank form of application to be used by the applicant. He is further given the power to adopt all proper rules and regulations in order to carry into effect the provisions of the bonus law as long as such rules and regulations are not inconsistent with the act.

Although the above law is phrased in mandatory language, seemingly requiring the applications to be filed on blanks furnished by the Adjutant General, we believe that provision to be directory only.

It was said in *Granite Bituminous Paving Co. v. McManus*, 144 Mo. App. 593, 607, 129 S.W. 448:

"The distinction between mandatory and directory enactments has often been under consideration by the courts. Into which of these classes any given statute falls is to be determined by its character and purpose. If no substantial rights depend upon it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than as prescribed therein and substantially the same results obtained, then the statute will generally be regarded as directory. * * *"

The basic purpose of the act was to provide a bonus for eligible veterans of World War I. The duty was placed upon the Adjutant General to determine the persons eligible for such bonus. This determination can be made and the ultimate purpose of the Legislature accomplished without requiring that the application be filed on the blank furnished by the Adjutant General.

Further information and proof beyond that contained in the quoted letter may be necessary before the Adjutant General is able

Major General A. D. Sheppard

to make his determination that the applicant is entitled to the bonus. However, it is not required that this determination be made before December 31, 1954, but merely that the application be filed before that date.

CONCLUSION

It is therefore the opinion of this office that the provision in the Soldiers' Bonus law, found in Laws of Missouri, 1951, page 653, that "Applications for such payments shall be filed with the Adjutant General * * * upon the blanks furnished by the Adjutant General," is directory only and that a letter such as that quoted herein will suffice as an application for bonus.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

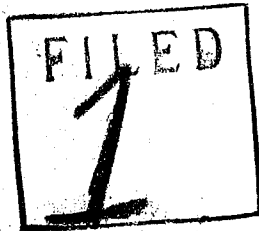
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

SALES TAX:
MOTOR VEHICLES:

Farm Tractors are not subject to motor vehicle sales tax under the provisions of Section 144.450, Laws of Missouri 1951, page 854, but sales tax must be paid upon their purchase as a sale of tangible property.



October 28, 1955

Honorable Clayton W. Allen
17th District
Rock Port, Missouri

Dear Senator Allen:

I have on hand your request for an opinion of my office which is as follows:

"I would like an opinion from your office, as to whether or not farm tractors are exempt from the payment of sales tax, under section 144.450, at page 245 of the Missouri Revised Statutes Cumulative Supplement, 1953 I wish to call your attention to the last line of said section."

It is quite true that farm tractors are exempted from the payment of motor vehicle and sales use tax by the provisions of Section 144.450, Laws of Missouri 1951, page 854. The wording of the section must be carefully noted, however, to arrive at the extension of the exemption provided. Paraphrasing the section it reads as follows:

"* * * The tax imposed by Section 144.440 shall not apply to motor vehicles on account of which the sales tax provided by this act shall have been paid, * * * nor to farm tractors."

While farm tractors are not taxed under the provisions of Section 144.440, supra, a tax imposed, to quote from the section, "* * * for the privilege of using the highways of this state * * *," the question as to whether tractors are subject to sales tax must be determined under the language of Section 144.020, RSMo, 1949, wherein is contained in subsection 1 the following:

"1. From and after the effective date of this chapter, there shall be and is hereby levied and imposed and shall be collected and paid:

Honorable Clayton W. Allen

"(1) Upon every retail sale in this state of tangible personal property a tax equivalent to two per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange."

A copy of an opinion of this office dated May 4, 1949 to G. H. Bates is enclosed herewith. That opinion is to the effect that the procedure of the collection of sales tax on motor vehicles as set up in the section, now No. 144.440, Cum. Supp. 1953, page 245, does not apply to trailers or semi-trailers. That opinion assumes, in accordance with Mr. Bates' letter, that they were subject to sales tax under the Sales Tax Law. In as much as farm tractors must be considered tangible personal property and fit all of the other requisites of the above section, the general sales tax act must be considered to apply to them.

CONCLUSION

It is, therefore, the opinion of this office that farm tractors are exempt from motor vehicle sales or use tax in accordance with Section 144.450, Cum. Supp., 1953, but that sales tax is due on the sale thereof as a tax on the sale of tangible personal property.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Yours very truly,

JOHN M. DALTON
Attorney General

JWF/bi

Enclosure: G. H. Bates
5-4-49

ADJUTANT GENERAL:
COMMISSIONS
MISSOURI NAVAL
MILITIA:

Commissions in force prior to the enactment of House Bill 133, 1951, have either been terminated by administrative action or have lapsed by operation of law.



November 29, 1955

Adjutant General
State of Missouri
State Office Building
Jefferson City, Missouri

Attention of Richard F. Shelley
Captain, MoANG
Administrative Assistant

Dear Sir:

You stated your recent request for an official opinion from this office as follows:

"This office has received a request for information concerning the status of officers appointed in the Missouri Naval Militia and we feel that it involves a legal decision to clarify the status of these officers. The question was worded as follows:

" 'I am requesting information concerning the status of officers of the Missouri Naval Militia whose commissions ante-dated the enactment of House Bill 133 in 1951 repealing Chapter 41, Revised Statutes of Missouri 1949. In reading the newly enacted statute I find no reference to what has happened to the commissions issued in the Missouri Naval Militia prior to the date House Bill 133 became law, and I would appreciate very much any information you might have which would inform me as to whether or not the commissions previously awarded have lapsed or whether or not those commissions were continued by executive order or some other legal means.'

"There is no record of the commissions in question having been terminated or extended in the records of this office. As well as can be determined from the commission, it was for an indefinite term unless terminated

Adjutant General, State of Missouri

by resignation, retirement, death, etc.

We respectfully request an opinion as to whether or not the commissions are still in force as quoted above."

The determination of the question as to whether or not a commission in a military organization is indefinite or for a specific period, when the letter of appointment does not state, depends upon the type of organization in which the commission is given. As you know, for many years commissions in the National Guard have been considered indefinite. Because of the provisions of federal statutes, we have considered that the commissions continued in effect until the withdrawal of federal recognition. We adhered to this concept in the state notwithstanding the fact that from 1919 until the 1951 enactment, House Bill 133, now Chapter 41 V.A.M.S., our statutes provided:

"Commissions of officers of the National Guard may be vacated upon resignation, absence without leave for three months, upon the recommendation of an efficiency board or pursuant to the sentence of a court-martial. Officers rendered surplus by the disbandment of their organizations shall be placed in the reserve. Officers may upon their own application be placed in said reserve."

Section 41.440, RSMo 1949.

The reserve alluded to was created in 1917. Section 8375, page 338, 1917 Laws. That section was continued and became Section 41.520 in the 1949 Revision.

The 1951 enactment omitted all reference to a reserve, and added the words "or withdrawal of federal recognition." Our state legislature has been somewhat tardy in keeping our state amendments current with National Guard Laws and Regulations of the Federal Government. The National Guard Reserve was discontinued by federal statute in 1933, when the National Guard of the United States was created. Since that time there has been an inactive national guard but no national guard reserve in which an officer could be placed. It will be noted that

Adjutant General, State of Missouri

the reserve mentioned in Sections 41.440 and 41.520 applied only to the National Guard; not to the militia as a whole, and not to the naval militia.

For a good many years the legislature has spoken of a "reserve" that could be created by the governor, under certain circumstances, from the nebulous and undefined "unorganized militia." See Section 41.190 of the 1949 Revision. Since this reserve could be created only under certain circumstances, that is not the reserve intended in Section 41.440.

Until the 1951 act the provisions of the naval militia remained separate from those pertaining to the National Guard and Air National Guard. At no time in the history of our state has there been a naval militia reserve. There has been, for a good many years, a provision in the naval militia sections, that "When not otherwise provided for, the government of the naval militia shall be controlled by the provisions of the military code of this state as now applied to organized militia." See Section 41.580 of the 1949 Revision. In view of the fact that there has been, since the creation of the federal constitution (See Art. I, Sec. 8, Par. 16, Const. of U.S.), a distinction between organizing and governing the militia, and in view of the fact that, as pointed out above, there is a question as to the validity of the National Guard Reserve as a legal entity for the eighteen years from 1933 to 1951, we do not believe that Section 41.580 could be used in conjunction with Section 41.440 so that we could say that an officer of the naval militia rendered surplus by the disbandment of his organization could be placed in a "Naval Militia Reserve." We therefore conclude that a commission in the Missouri Naval Militia can continue only so long as there exists some unit or organization constituting a part or the whole of the Missouri Naval Militia. The question then arises: Is there now, or was there immediately prior to the 1951 act, a Missouri Naval Militia in existence?

We find neither federal nor state statute which specifically created such. We find only that the federal statutes, until 1938, stated:

"Of the organized militia as provided by law, such part as may be duly prescribed

Adjutant General, State of Missouri

in any state, territory or the District of Columbia shall constitute a naval militia."

Currently, the federal statute states:

"The Naval Militia consists of the Naval Militia of the States, Territories, and the District of Columbia."

See 50 U.S.C., Section 1071. The Missouri Naval Militia provision, until 1951, merely stated:

"There shall be allowed in addition to the companies of the military code of Missouri, as now provided by law, not more than ten divisions of naval militia, to be known as 'The Missouri Naval Militia.'"

See Section 41.530 of the 1949 Revision.

Obviously, then, some positive administrative acts have been necessary for the creation of a Missouri Naval Militia. It is our understanding that such actions have been taken in the past, and that for a number of years the state legislature appropriated money for the support of our naval militia. However, as we have further learned from you informally, the Adjutant General's office took the positive administrative action of dropping the membership of the Missouri Naval Militia from the rolls upon the entry of those members to active duty in World War II. Since, at that time, under Section 15098 of the 1939 Revision, the governor had the power to alter, divide, annex, consolidate or disband the organization of the naval militia if, in his judgment, the efficiency of the forces could be increased, such action constituted a termination of the commission of any individual in the Missouri Naval Militia.

We are not informed as to whether or not all of the members of the Missouri Naval Militia entered active duty. However, the old provisions of the statutes pertaining to the Missouri Naval Militia were expressly repealed by House Bill 133, Laws of 1951, as were all sections pertaining to the military forces of the state, and ninety-four new sections were

Adjutant General, State of Missouri

enacted in lieu thereof. Since the 1951 law provides only that the naval militia of the state shall consist of "such elements of the reserve naval forces of the United States as are allocated to the state by the President or the Secretary of the Navy, and accepted by the state" (Section 41.050), this, of necessity, terminated the commissions of all persons in the Missouri Naval Militia even if it could be argued that the previous administrative action by the adjutant general, as mentioned above, did not terminate a part of them. We are informed that no elements of the naval reserve have been allocated to and accepted by the state since World War II. The legislature has refused to acknowledge the existence of or to make appropriations for such an organization since World War II. No action has been taken that can be considered as a revival or continuation of or the creation of a new naval militia as has been taken with regard to the rest of the organized militia. Whatever might have been considered the status of the naval militia commissions immediately prior to the 1951 repeal of the old statute, certainly the naval organization in which any person held his commission ceased to exist following the repeal.

CONCLUSION

It is, therefore, our conclusion that: (1) the Missouri Naval Commissions awarded prior to the 1951 act were either terminated by administrative action or lapsed by operation of law; (2) that positive administrative action is necessary before they may be reinstated or new ones created.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

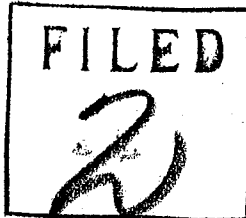
Very truly yours

John M. Dalton
Attorney General

AGRICULTURE:
STATE ENTOMOLOGIST:

State entomologist may establish quarantine to prohibit the transportation into the state of products, articles or things capable of carrying the pink bollworm.

January 6, 1955.



Mr. Julius R. Anderson
State Entomologist
Department of Agriculture
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"A very destructive insect of Cotton, the Pink Bollworm is spreading North and Eastward across Arkansas into Missouri from Texas and Oklahoma. This insect is considered a serious threat to the Missouri Cotton industry so a quarantine which would prohibit the entry of unprocessed cotton, cotton products or cotton harvesting equipment, especially used cotton 'pick-sacks' into Missouri from states that now are infested with the pink bollworm is being considered.

"Sections 263.130 and 263.140 R.S.Mo 1949 quite plainly allow such a quarantine to be established as a regulation if cotton is considered included under the definition of plants and plant products as defined in Section 263.020 (4), R.S. Mo. 1949 of the Missouri Plant Law.

"We would like to have your interpretation in regards to Cotton as a field crop being included under plants and plant products, Section 263.020 (4) R.S.Mo. 1949 of the Missouri Plant Law."

Mr. Julius R. Anderson

Since you refer only to a quarantine which would prohibit the entry into the State of Missouri of cotton or other article capable of carrying the pink bollworm, we need only refer to Section 263.130 RSMo 1949, relating to such a quarantine. Said section provides as follows:

"The state entomologist, wherever he shall find that there exists in any other state, territory, or district, or part thereof, any dangerous plant disease or insect infestation with reference to which the secretary of agriculture of the United States has not determined that a quarantine is necessary and has not duly established such quarantine, is hereby authorized to promulgate, and to enforce by appropriate rules and regulations, a quarantine prohibiting or restricting the transportation into or through the state, or any portion thereof, from such other state, territory, or district of any class of nursery stock, plant, fruit, seed, or other article of any character whatsoever, capable of carrying such plant disease or insect infestation. The state entomologist is hereby authorized to make rules and regulations for the seizure, inspection, disinfection, destruction, or other disposition of any nursery stock, plant, fruit, seed, or other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, a quarantine with respect to which shall have been established by the secretary of agriculture of the United States, and which have been transported to, into, or through this state in violation of such quarantine."

It is noted that this section provides that if the state entomologist finds that there exists an insect infestation with reference to which the Secretary of Agriculture of the United States has not determined that a quarantine is necessary, said state entomologist is authorized to promulgate and enforce by appropriate rules and regulations a quarantine prohibiting or restricting the transportation into or through the state of any class of nursery stock, plant, fruit, seed or other article of any character whatsoever capable of carrying such insect infestation. We note also Section 263.050, which authorizes

Mr. Julius R. Anderson

and empowers the state entomologist to promulgate and enforce such quarantine regulations as may be necessary in carrying out the provisions of Chapter 263. You specifically inquire whether cotton is a plant or plant product, as contemplated by Chapter 263, over which the state entomologist would be authorized to impose a quarantine to prohibit the dissemination of insect infestation under the provisions of Section 263.130, supra. Section 263.020 defines the term "insect pests and diseases" as follows:

"(1) Insect pests and diseases: Insect pests and diseases injurious to plants and plant products of this state, including any of the stages of development of such insect pests and diseases."

The term "plants and plant products" is defined in the same section as follows:

"(4) Plants and plant products: Trees, shrubs, vines, forage and cereal plants, and all other plants; cuttings, grafts, scions, buds, and all other parts of plants; and fruit, vegetables, roots, bulbs, seeds, wood, lumber, and all other plant products."

While cotton as a field crop does not specifically appear in the definition of plants and plant products, we are of the opinion that it was the legislative intent to include such crop within the term "and all other plants." Ordinarily, where general words such as the words "all other plants" follow particular words, the general words are held not to amplify or enlarge the particular, but are themselves restricted and explained by the particular terms. However, we are of the opinion that such rule of statutory construction is not applicable in the instant case. This rule of statutory construction is used merely as an aid in ascertaining the legislative intent, and such rule will not prevail where a different intent is clearly indicated. Further, such rule does not apply in the construction of statutes where the specific words of a statute signify subjects greatly different from one another (State v. Eckhardt, 133 S.W. 321, 232 Mo. 49). It is quite evident from the definition of plants and plant products that the words "trees, vines, forage and cereal plants" are greatly different from one another, and therefore it is our opinion that when the legislature included the phrase "and all other plants" such term is broad enough to include cotton as a field crop.

Mr. Julius R. Anderson

CONCLUSION

Therefore, it is the opinion of this office that the state entomologist is empowered and authorized to establish a quarantine which would prohibit the entry into this state of cotton, cotton products, or other articles of any character whatsoever capable of carrying an insect infestation such as the pink bollworm.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

FOOD AND DRUGS:

DIVISION OF HEALTH MAY
EMBARGO FOOD AND DRUGS
WHEN:



(1) Div. of Health legally unauthorized to embargo food, drugs, devices or cosmetics under Sec. 196.030, RSMo 1949, or any other of Missouri's Food and Drug Act for sole purpose of holding same until such goods can be seized by Federal Government in Federal Court proceedings under Federal food and drug laws. (2) Div. of Health can embargo food or drugs for purposes mentioned in Sec. 196.030 and may use results of examination, analyses or laboratory tests made by the Federal Government as evidence in any case instituted for violation of Mo. food and drugs laws. (3) Criminal proceedings for violation of Mo. food and drug laws may be brought even though same offense is crime under Federal statute. Defendant may be prosecuted, convicted and punished for same act on same evidence under both statutes.

April 21, 1955

Honorable James R. Amos, M.D.
Director, Division of Health
Jefferson City, Missouri

Dear Dr. Amos:

This department is in receipt of your request for a legal opinion which reads in part as follows:

"The Missouri Food and Drug Laws and Regulations are very similar to the Federal Food and Drug Laws. Section 196.050 RSMo, 1949, prevents us from adopting regulations more stringent than the federal act. We coordinate our activities with FDA to prevent duplication of activities and we receive help and assistance from FDA, and they receive help and assistance from us.

"One of the ways we have helped FDA is to embargo foods, drugs, and devices which they believe are in violation of the federal act; since all seizure action must be approved by the Washington office, it requires from one to three weeks for FDA to obtain a federal seizure order. The FDA has no authority under their laws to embargo foods, drugs, and devices, and they have therefore asked the states to embargo the goods until they could obtain a federal seizure order.

"Recently our authority to embargo goods

Honorable James R. Amos, M.D.

and hold them pending federal seizure has been questioned.

"Can we under Section 196.030 or any other appropriate Section in the Act embargo such goods holding them until the federal seizure order is obtained? Can we embargo such goods and use the federal laboratory or other tests made by FDA as the basis for filing a state case? If the FDA files a federal case, can we also file a state case against the same firm, and use the same laboratory results or inspectional data for the state case? * * * "

We construe the first inquiry to be whether or not the Division of Health is authorized to embargo any food, drug, device or cosmetic, under the provisions of Section 196.030, RSMo 1949, or any other section for the sole purpose of holding them until they can be seized under proceedings instituted by the Federal Government in a Federal Court and brought against such goods or the owner for an alleged violation of the Federal Food and Drug Act. In such instance the Division of Health would take no further action in the matter.

Section 196.030, RSMo 1949, authorizes the Division of Health to embargo food, drugs, devices or cosmetics for the purposes stated therein, and also prescribes the procedure the Division of Health shall follow after it has embargoed such articles. Said section reads in part as follows:

"1. Whenever a duly authorized agent of the division of health finds or has probable cause to believe that any food, drug, device, or cosmetic is adulterated, or so misbranded as to be dangerous or fraudulent, within the meaning of sections 196.010 to 196.120, he shall affix to such article a tag or other appropriate marking, giving notice that such article is, or is suspected of being adulterated or misbranded and has been detained or embargoed, and warning all persons not to remove or dispose of such article by sale or otherwise until permission for removal or disposal is given by such agent or the court. It shall be unlawful for any person to remove or dispose of such detained or embargoed article by

Honorable James R. Amos, M.D.

sale or otherwise without such permission.

"2. When an article detained or embargoed under subsection 1 has been found by such agent to be adulterated, or misbranded, he shall petition any magistrate, or judge of the circuit court, or court of common pleas, in whose jurisdiction the article is detained or embargoed for an order for condemnation of such article. When such agent has found that an article so detained or embargoed is not adulterated or misbranded, he shall remove the tag or other marking.

"3. If the court finds that a detained or embargoed article is adulterated or misbranded within the meaning of sections 196.010 to 196.120, such article shall, after entry of the decree, be destroyed or sold under the supervision of such agent as the court may direct, but no such article shall be sold contrary to any provisions of said sections, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the general fund of the state of Missouri; provided that when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court after entry of the decree and after such costs, fees, and expenses have been paid and a good and sufficient bond, conditioned that such article shall be so labeled or processed, has been executed, may by order direct that such article be delivered to the claimant thereof for such labeling or processing under the supervision of an agent of the division of health. The expense of such supervision shall be paid by the claimant. When the article is no longer in violation of section 196.010 to 196.120, and the expenses of such supervision have been paid, the division of health shall present these facts to the court, and such bond shall then be returned to the claimant of the article."

As we read Section 196.030, supra, it is apparent that

Honorable James R. Amos, M.D.

the legislative intent and purpose of this section are clear; that the language used therein is without ambiguity; and that the food, drugs, devices or cosmetics are to be embargoed only for the reasons stated therein.

After the products have been embargoed for the purposes authorized, the duties and procedure that must be followed by the Division of Health are set out in detail by this section. Such duties and procedure are mandatory, and the Division of Health is legally unauthorized to follow some other procedure however reasonable or commendable it may be.

Said section specifically provides that the duly authorized agent of the Division of Health, upon embargoing the products, for the reasons stated, shall tag, or mark them in some other appropriate manner until such time as he can determine if said products have been misbranded or adulterated in violation of the applicable statutes. If the products are found to be misbranded or adulterated, then he must apply to any of the courts named, and having jurisdiction for an order to condemn said goods and to sell or destroy same as the court may order. However, if the agent finds the goods not to be misbranded or adulterated within the meaning of Sections 196.010 to 196.120, RS Mo 1949, he shall remove the tags or other markings therefrom and the property may be turned over to the owner, thereby putting an end to further proceedings in the matter.

Neither this section nor any other of the Missouri food and drug statutes provide that the Division of Health shall have power to embargo foods, drugs, devices or cosmetics, and turn them over to the Federal Government or any of its agencies, for the purpose of bringing any procedure against the goods or their owner for some violation of the Federal Food and Drug Act.

The Division of Health's power to embargo food and drugs is limited to that granted by Section 196.030, and since this section does not permit it to do so, the Division of Health is without any legal authority to embargo food, drugs, devices or cosmetics and turn over possession of same to the Federal Government or any of its agencies for the purposes mentioned above. Therefore, our answer to the first inquiry is in the negative.

If the Division of Health has embargoed food or drugs under the provisions of Section 196.030, it must then be determined if same are misbranded or adulterated within the meaning of the statute. This determination must be made in accordance with the provisions of Sections 196.070, 196.075, 196.095, 196.110 and 196.115, RSMo 1949. Before discussing this question further, we

Honorable James R. Amos, M.D.

feel it proper to clarify the term "state case."

We were not sure as to what meaning was intended to be given the term "state case" used in the second inquiry and have requested you to explain same to us. In accordance with our request, you have informed us that the term "state case" referred to in the above inquiry had reference to any civil or criminal proceeding which might be instituted by the Division of Health in courts having jurisdiction of any alleged violation of the Missouri food and drug statutes.

Section 196.055 allows the Division of Health or its agents to have access into places where food, drugs, devices or cosmetics are manufactured or kept and reads as follows:

"The division of health or its duly authorized agent shall have free access at all reasonable hours to any factory, warehouse or establishment in which foods, drugs, devices, or cosmetics are manufactured, processed, packed, or held for introduction into commerce, or to enter any vehicle being used to transport or hold such foods, drugs, devices, or cosmetics in commerce, for the purposes:

"(1) Of inspecting such factory, warehouse, establishment, or vehicle to determine if any of the provisions of sections 196.010 to 196.120 are being violated; and

"(2) To secure samples or specimens of any food, drug, device or cosmetic after paying or offering to pay for such sample. It shall be the duty of the division of health to make or cause to be made examinations or analyses of samples secured under the provisions of this section to determine whether or not any provision of sections 196.010 to 196.120 is being violated."

It is noted that this section authorizes agents of the Division of Health to secure samples or specimens of any food or drugs, and to make or cause to be made any examination or analyses of same in order to determine whether or not any provisions of Sections 196.010 to 196.120 are being violated.

Honorable James R. Amos, M.D.

Said section, nor any others of the Missouri food and drug statutes provide that the samples of food or of the products taken shall be examined or analyzed only by the Division of Health or its agents, and at a particular time or in a particular manner. As we understand this section, the Division of Health agents may, within their discretion, make such examination themselves, or may have it made by others, under careful direction of said agents.

Since the making of examinations of this nature is not limited to any particular persons who may perform same for the Division of Health, it is believed that such examination or analyses could be made in a laboratory of the Federal Government by Federal employees.

Therefore, our answer to the second inquiry is in the affirmative.

The third inquiry we construe as follows:

If a case is filed in the proper Federal Court for an alleged violation of the Federal Food and Drug Act, can the Division of Health also file a case for an alleged violation of the Missouri Food and Drug laws against the same defendant, involving the same facts, and in such case can it use the same laboratory results, inspectional data or other evidence obtained by the Federal Government. It will be recalled that you have previously informed us that by the term "state case," you have reference to either a civil or criminal case which might be instituted in the court having jurisdiction by the Division of Health, for an alleged violation of the Missouri Food and Drug statutes.

In view of the fact that Section 196.030, supra, referred to in the opinion request deals with the embargoing of foods and drugs when there is probable cause to believe same to be misbranded or adulterated within the meaning of Sections 196.010 to 196.120, our discussion regarding cases which might be filed by the Division of Health will be limited to those regarding misbranding or adulteration of food and drugs.

Our references and any discussion of the Federal Food and Drug statutes will also be limited to that portion of same dealing with the adulteration or misbranding of foods or drugs.

Upon examination of the United States Code Annotated, we find Title 21 is in regard to food and drugs, and that Sections

Honorable James R. Amos, M.D.

1 to 15, inclusive, of Chapter 1 of that title are devoted exclusively to the subject of adulteration and misbranding of food and drugs, and that violations of these sections have been held to be criminal offenses by the Federal courts. For example, in the case of United States v. Wells, 225 Fed. 320, the defendant was charged by information with a violation of the Federal Food and Drug Act. By demurrer he questioned the validity of the information and the proceedings thereof. The court reached the conclusion that information was the proper method by which to prosecute alleged violations of that nature, and at 1. c. 321 said:

"There is no doubt that offenses of this character may be prosecuted upon information. The question here is, Is the proceeding by information in conformity with law?"

In the case of United States v. Weeks, 225 Fed. 1017, the defendant was charged under the Federal pure food statutes with misbranding a product labeled "Fruit Wild Cherry Compound" and it was also alleged that the product was adulterated. The court held that the proper method of prosecution was by information, but sustained a demurrer and ordered the information quashed for the reason that no complaint under oath had been filed against the defendant.

Again, in the case of Von Bremen v. United States, 192 Fed. 904, the defendant was charged by information with misbranding a product "salad oil" in violation of the food and drug law. In its opinion the court stated that the case was a criminal one, and in order to convict, the jury must find the defendant guilty beyond a reasonable doubt. At 1. c. 906 the court said:

"The act does not make the intention of the defendants material; but, as the case was a criminal one, the jury was bound to be convinced beyond a reasonable doubt that the article in question was misbranded before they could find the defendants guilty. We think that the proof did not justify such a conclusion, and that the defendant's motion for the direction of a verdict in their favor should have been granted."

In view of the Federal decisions cited above, holding that

Honorable James R. Amos, M.D.

the adulteration or misbranding of foods or drugs are criminal offenses, and which decisions appear to be typical ones upon the subject, we shall assume that the reference made in the third inquiry of the opinion request to "federal cases" refers to adulteration or misbranding of foods or drugs under the Federal law and to criminal prosecutions under said law.

This brings us to that point in our discussion when we must determine if an act declared and punishable as a criminal offense under a Federal statute may also be defined and punishable as a criminal offense under a state law; if prosecutions could be had under our statutes, for the same act, and upon the same evidence; and if a conviction under one statute would be a bar to prosecution under the other.

The courts have held that an act may be a criminal offense under a Federal statute and also under that of a State, and one might be prosecuted, convicted and punished under both laws for the reason that the offenses would be separate and distinct ones under two different systems of law. Under these circumstances the defendant would not be put twice in jeopardy within the meaning of the constitutional provision.

Illustrative of this principle, we call attention to the case of In Matter of M. T. January, 295 Mo. 653. This was an original proceeding instituted in the Supreme Court for a writ of habeas corpus. The petition alleged that petitioner was illegally restrained of his liberty by the sheriff of Vernon County, Missouri, who had custody of petitioner by virtue of a commitment issued by the Circuit Court of Vernon County. The case was submitted upon an agreed statement of facts. From such facts it appears that petitioner had been subpoenaed as a witness before the Vernon County Grand Jury and that the foreman inquired of petitioner if he had purchased any intoxicating liquor in that county within the last twelve months. The witness refused to answer the question upon the ground that it might incriminate him, and that he claimed his right to refuse to answer under the provisions of Section 23, Article II of the Constitution of Missouri. For his refusal to answer such question he was found to be in contempt of court and duly committed to jail by court order.

The attorney general represented the sheriff and in his argument to the court contended that the purchaser of liquor under the laws of this state is not a party to a crime, therefore petitioner could not legally refuse to answer the question asked him. In passing upon the matter, the court said at l.c. 661 and 662:

Honorable James R. Amos, M.D.

"Concede without deciding the proposition as contended for by the Attorney General, it does not reach the real heart of this case, and therefore does not answer the contention made by counsel for the petitioner, for reason that this is a dual form of government of ours, the State and Federal, both of which have jurisdiction over the crimes for the sale of intoxicating liquor, and both have the power and authority to investigate such crimes, and to try to punish the criminals for such offenses, and each government may separately punish the criminal for the same offense, and the conviction and punishment by the one, in a particular case, is no bar to the right of the other to punish him again upon identically the same state of facts, or, in other words, the doctrine of res adjudicata does not apply."

It is our contention that the general principle of law decided in this case is applicable to those instances when the Missouri food and drug statutes declare an act to be a criminal offense and the same act is also declared to be a criminal offense under the Federal Food and Drug statutes. In such instances the offender may be prosecuted, convicted and punished under both laws for the same act.

In the case of Cleveland Macaroni Company v. State Board of Health, 256 Fed. 376, the claim of defendant was that plaintiff's macaroni was mislabeled "egg noodles" when they failed to comply with the California statutes defining "egg noodles" and the product should have been labelled "plain noodles," or "water noodles."

Plaintiff contended that Congress had legislated on the same subject as that of the state law in question, and the Federal law prescribed the exclusive requirements for the manufacturer to follow. In discussing this matter, the court said at l. c. 379:

"3. There is nothing in the state law, so far as the provisions here involved are concerned, which would seem to

Honorable James R. Amos, M.D.

transcend the power of the state in the reasonable exercise of its regulatory power. The provisions are evidently aimed at the protection of its inhabitants against deceit and misrepresentation as to the real character of the food presented for their consumption; and it matters not in this respect if plaintiff's goods be, as claimed, healthful and nutritious food and free from deleterious matter. It is a question of requiring them to be labeled and sold for what they really are, and not as something else; one of fair dealing with the public. *The Hebe Co. v. Shaw*, 248 U.S. 297, 39 Sup. Ct. 125, 63 L.Ed.---

"(3) 4. It was perfectly competent for the state act to adopt as a standard of purity for the enforcement of its regulations the determinations of the Department of Agriculture, and such enactment involves no obnoxious delegation of legislative power. *Ex parte Gerino*, 143 Cal. 412, 77 Pac. 166, 66 L.R.A. 249; *Arwine v. Board Medical Examiners*, 151 Cal. 499, 91 Pac. 319; *St. Louis, I.M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061."

From the foregoing it is beyond question that an act may be a violation of the Missouri food and drug statutes pertaining to misbranding and adulterating, and at the same time be a violation of the food and drug laws prohibiting misbranding and adulterating of food and drugs. It is our thought that one may be prosecuted under both statutes for an act declared to be a criminal offense under each statute, and that the same laboratory results, inspectional data or other evidence may be used by the prosecution in each case.

CONCLUSION

It is the opinion of this department:

(1) That neither the provisions of Section 196.030, RS Mo 1949, nor any other section of the Missouri food and drug statutes authorize the Division of Health to embargo foods,

Honorable James R. Amos, M.D.

drugs, devices or cosmetics for the sole purpose of holding them until they can be seized by the Federal Government under proceedings instituted in a Federal court against such goods or the owner for an alleged violation of the Federal food and drug statutes.

(2) That the Division of Health may embargo food, drugs, devices and cosmetics under the provisions of Section 196.030, RSMo 1949, for the purposes therein provided, and may use the results of any laboratory examinations, analyses or tests made by the Federal Government or its employees, as evidence in any civil or criminal case instituted by the Division of Health for an alleged violation of any of the provisions of the Missouri food and drug statutes.

(3) The Division of Health may have criminal proceedings instituted in the court having jurisdiction for certain alleged criminal violations of the Missouri food and drug statutes even though the same offense is declared to be a crime and punishable as such under the Federal food and drug laws. In such instances the defendant may be prosecuted, convicted and punished for the same offense upon the same evidence under both State and Federal statutes, and prosecution under one such statute will not be a bar to prosecution under the other.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:ma:da

METROPOLITAN ST. LOUIS
SEWER DISTRICT:
DIVISION OF HEALTH:
REGULATIONS:

The Division of Health is under the responsibility of requiring submission to it and approval by it of plans and specifications for improvements and extensions of sewers on the Metropolitan St. Louis Sewer District.



July 20, 1955

Honorable James R. Amos, M.D.
Director
The Division of Health
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Enclosed herewith is a copy of the plan of the Metropolitan St. Louis Sewer District which was adopted by the voters of St. Louis and St. Louis County on February 9, 1954. Under Section 3.020, (19), Page 13, the Metropolitan St. Louis Sewer District is granted the power to approve, revise, or reject the plans and designs of all outfall sewers, trunks, mains, submains, interceptors, lateral sewers, outlets for sewerage, storm water drains, pumping and ventilating stations, and disposal and treatment plants and works proposed to be constructed, altered, or reconstructed by any other person or corporation, private or public, in the District. No such sewer or drainage facilities shall be constructed or reconstructed without the approval of the District. Any such work shall be subject to inspection and supervision of the District. Under Section 12.060, Page 32, the plan provides that all existing ordinances, orders, rules, and regulations pertaining to matters which are by this Plan placed under the jurisdiction of the District herein created, shall remain in full force and effect until superseded by ordinances, orders, rules, or regulations of the District.

"We are also enclosing a copy of a policy statement of the Metropolitan St. Louis Sewer District in regard to the procedure for applicants for approval of subdivision sanitary sewers where trunk sewers are not presently available.

Honorable James R. Amos, M.D.

"A copy of the regulations of the Division of Health governing the installation, extension and operation of public sewerage systems is enclosed for information and reference purposes. As indicated on Page 3, these regulations were developed in accordance with powers granted under Chapter 192, Revised Statutes of Missouri, 1949, and as required by Article IV, Section 16, Constitution of the State of Missouri, the regulations were filed with the Secretary of State of Missouri on July 16, 1948.

"With respect to the above and other provisions of the Metropolitan St. Louis Sewer District plan and policy statement, we respectfully request an opinion as to whether the Division of Health is relieved of the responsibility of requiring the submission of plans and specifications for proposed sanitary sewerage improvements within that District to the Division of Health for examination and approval."

All statutory references made by us herein are to the MoRS 1949, unless otherwise indicated.

The issue here, as stated by you, is whether the Metropolitan St. Louis Sewer District, (hereinafter referred to as "the sewer district"), which includes contiguous areas in both St. Louis City and County, which is preparing to embark upon a very extensive sewer improvement project, is required to submit its plans and specifications to the Division of Health of Missouri for approval.

The regulations of the Division of Health of Missouri (hereinafter referred to simply as "the division") clearly do make this requirement. We direct your attention to the following portion of these regulations:

"REGULATIONS
GOVERNING THE INSTALLATION, EXTENSION, AND OPERATION OF PUBLIC
SEWERAGE SYSTEMS

"Section 1. Definitions - For the purpose of these rules and regulations, the terms used are defined as follows:

"'Sewage' - The water-carried waste products or discharges from human beings or animals, or chemicals or other wastes from residences, public or private buildings, swimming pools or industrial establishments, together with such ground, surface, or storm water as may be present.

Honorable James R. Amos, M.D.

"Sewer Systems" - All structures, conduits and pipe lines by which sewage is collected, transported and discharged to the point of disposal, except plumbing within and in connection with buildings and service pipes from buildings to street sewers.

"Sewage Treatment Plants" - All devices and appurtenances which treat or were designed to treat sewage by changing the nature of, or removing any of, its constituents, before final disposal into any of the waters, or upon any of the lands of the state.

"Waters of the State" - All lakes, rivers, streams, ponds, springs, wells, and other bodies of surface or ground water, natural, or artificial, within the state or its jurisdiction.

"Owner" - The state, county, city, town, village, corporation, firm, company, institution, person or persons owning or operating any sewer system or sewage treatment plant.

"Division of Health" - The Division of Health of the State Department of Public Health and Welfare of Missouri.

"APPROVAL OF PLANS REQUIRED FOR PUBLIC SEWERAGE SYSTEMS

"Section 2. Preliminary Report Required - Before detailed plans and specifications for new construction or improvements are prepared, the owner or his authorized agent shall submit to the Division of Health a preliminary report concerning the construction or improvements to be made, together with such preliminary plans and reports as have been made, whereupon the Division of Health will outline the requirements as regards further investigations, analytical data, information required and general design of proposed works, conformity with which will meet approval.

"Section 3. Submission of Plans for New Sewage Works - Every owner or his authorized agent, before installing or entering into contract for installing a sewer system or sewage treatment plant, shall submit, in duplicate, to and receive the written approval of the Division of Health for complete plans and specifications fully describing such sewage works, and thereafter such plans and specifications shall be substantially adhered to unless deviations are submitted to and receive the written approval of the Division of Health.

"Section 4. Submission of Plans for Alteration to Sewage Works - Every owner or his authorized agent, before making or entering into contract for making alterations or changes in, or additions to, any existing sewer system or sewage treatment plant, shall submit to and receive the written approval of the Division

Honorable James R. Amos, M.D.

of Health of complete plans and specifications fully describing such alterations, changes, or additions; and, thereafter, such plans and specifications must be substantially adhered to unless deviations are submitted to and receive the written approval of the Division of Health.

"Section 5. Final Approval - Every owner, before accepting or placing in operation a new sewer system or sewage treatment plant, or additions to, or changes or alterations in, any existing sewer system or sewage treatment plant, shall receive written final approval of the Division of Health stating that the completed work substantially adheres to the approved plans and specifications.

"Section 6. Requirements - For the information of those concerned in the preparation of plans and specifications for the construction of sewer systems and sewage treatment plants, the Division of Health will issue from time to time the general requirements concerning submission of plans, necessary data, design details, etc., which will meet the approval of the Division of Health.

"(In accordance with powers granted under Chapter 192, Revised Statutes of Missouri, 1949, and as required by Article IV, Section 16, Constitution of the State of Missouri, the above regulations were filed with the Secretary of State of Missouri on July 16, 1948.)"

On March 10, 1949, this department rendered an opinion, a copy of which is enclosed, to William Lee Dodd, Prosecuting Attorney of Ripley County. We invite your attention to this opinion, which constitutes an exhaustive study of the matter before us, and particularly to that portion of the opinion beginning with the first paragraph following the quotation on page 12 through the second paragraph on page 15.

It will be noted that the regulation of the Division, set forth on page 14 of the opinion, is substantially the same as the regulation of the Division set forth by us earlier in this opinion. As will be noted, the Dodd opinion concludes, in regard to the regulation of the Division quoted in the Dodd opinion, that "we believe it clearly within the scope of its (the Division's) authority to require municipalities and others to seek approval of their (sewer) alteration plans so that public nuisances will not arise".

As being indicative of the general controlling authority of the Division over sewers and sewer construction, we enclose a copy of an opinion rendered by this department on February 10, 1950, to the Division, in which we held that "the Division of Health may require the code of regulations prepared by the Board of Plumbing and Sewer Construction of St. Louis County to provide regulations that will protect the public health and safety."

Honorable James R. Amos, M.D.

As being further indicative of the same authority, we enclose a copy of an opinion rendered by this department on September 28, 1953, to Rex A. Henson, Prosecuting Attorney of Butler County, which opinion holds that the division may join as relator in an action by the Prosecuting Attorney of Butler County or the Attorney General of the state, to enjoin the extension of a sewer system, the plans and specifications of which have been submitted to and disapproved by the Division. This, we feel, is authority for the position that plans and specifications of the sewer district must be submitted to and approved by the Division.

You have enclosed with your letter a pamphlet entitled "Proposed Plan of the Metropolitan St. Louis Sewer District," and have directed our attention to paragraph 19 of Section 3.020 of the Plan, which, referring to the power of the sewer district reads:

"To approve, revise, or reject the plans and designs of all outfall sewers, trunks, mains, submains, interceptors, lateral sewers, outlets for sewerage, storm water drains, pumping and ventilating stations, and disposal and treatment plants and works proposed to be constructed, altered, or reconstructed by any other person or corporation, private or public, in the District. No such sewer or drainage facilities shall be constructed or reconstructed without the approval of the District. Any such work shall be subject to inspection and supervision of the District."

At first reading it would appear that the above contemplates that all authority for the approval of plans and specifications resides in the sewer district. A more prolonged consideration of it, however, does not indicate that it is intended to be or is exclusive of approval of the plans and specifications by the Division.

You also directed our attention to Section 12.060 of the Plan, which reads:

"All existing ordinances, orders, rules, and regulations pertaining to matters which are by this Plan placed under the jurisdiction of the District herein created, shall remain in full force and effect until superseded by ordinances, orders, rules, or regulations of the District."

Honorable James R. Amos, M.D.

We believe, likewise, that the above is not exclusive of the regulation of the Division referred to above. But even if we are mistaken in the meaning which we ascribe to paragraph 19 of Section 3.020 and Section 12.060 of the Plan, and if the meaning is that the sewer district is to be the final and absolute authority, and that the Division be excluded from any participation, said intention cannot be legally effectuated if it be contrary to law, as we believe it would be.

In this regard we direct attention to paragraph 1.010 of the Plan, which reads:

"In the interest of the public health and for the purpose of providing adequate sewer and drainage facilities within the boundaries herein defined, or as extended in the manner herein provided, there is hereby established a metropolitan sewer district under the provisions of Section 30 of Article VI of the Constitution of Missouri. Said District shall be known by and under the name of 'The Metropolitan St. Louis Sewer District.' Said District, hereinafter referred to as 'the District,' shall be a body corporate, a municipal corporation, and a political subdivision of the state, with power to adopt, use, and alter at its pleasure a corporate seal, sue and be sued, contract and be contracted with, and in other ways to act as a public corporation within the purview of this Plan, and shall have the powers, duties, and functions as herein prescribed."

Also to Section 1.020, which reads:

"Pursuant to the provisions of this Plan and subject to the limitations imposed hereby and by the Constitution of Missouri, all powers of the District shall be vested in a Board of Trustees, hereinafter referred to as 'the Board', which shall enact District ordinances, adopt budgets, determine policies, and appoint the Executive Director, who shall execute the ordinances and administer the government of the District and all subdistricts. The powers of the District shall be exercised in the manner prescribed in this Plan, or, if not prescribed herein, in such manner as may be prescribed by the Board."

By the above the sewer district is made "a municipal corporation" and a "political subdivision of the state". It is, therefore, a "local" unit of government established for a particular

Honorable James R. Amos, M.D.

purpose, and is given the authority to enact ordinances.

We now direct attention to Section 192.290 (RSMo 1949), which reads:

"All rules and regulations authorized and made by the division of health in accordance with this chapter shall supersede as to those matters to which this chapter relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the division of health which may be necessary for the particular locality under the jurisdiction of such local authorities."

If, therefore, paragraph 19 of Section 3.020 and Section 12.060 of the Plan, are in conflict with the regulations of the Division, the above provisions of the Plan must give way to the regulations of the Division, according to Section 192.290, supra, provided, of course, that the Division was authorized to enact the regulations and requiring submission to it for approval of all plans and specifications for sewer improvements and extensions in the state. As we have already pointed out, the Dodd opinion held that the Division was so authorized. We will here elaborate somewhat upon this point. In so doing we direct attention to the first line of Section 192.020, which reads:

"It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state and all its subdivisions.* * *" (Underscoring ours.)

The above grant of authority would appear to be about as broad, general, and inclusive as it could be made to be.

In Am. Jur., Vol. 11, Sec. 271, we note the following general statement of the law on this matter:

"One of the most important fields of legislation in which a state may enact measures under the police power is that of regulations in the interest of public health and safety. No exhaustive examination of all the matters which may be regulated under this object of the police power is practicable, but under it laws may be passed providing for drainage and sewer systems, for the removal of large bodies of stag-

Honorable James R. Ames, M.D.

nant water which produce breeders of disease, for irrigation and reclamation, for levee, flood control, and conservancy acts, for the protection of a municipal water supply, and for the protection of a watershed. Similar valid regulations are those requiring the owners of a lot which has been declared to be dangerous to the public health to fill it up to a certain level; dealing with the evils of overcrowded tenements and unhealthy slums; requiring the plumbing installed in buildings to meet certain specifications; making it a penal offense to discharge any refuse matter into a running stream; for forbidding anyone to make use of a polluted water supply for drinking purposes; providing for the collection and removal of garbage, refuse, and offal in thickly populated cities; and, in general prohibiting the maintenance of any unsanitary condition which amounts to a nuisance."

CONCLUSION

It is the opinion of this department that the Division of Health is under the responsibility of requiring submission to it and approval by it of plans and specifications for improvements and extensions of sewers of the Metropolitan St. Louis Sewer District.

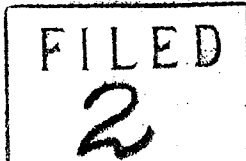
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld
encs. (2)

PURE FOOD AND DRUGS:
ADULTERATION:
MISBRANDING:
MISLABELING:
BUISMAN'S FAMOUS DUTCH FLAVORING:



Dr. James R. Amos
Director
Division of Health
Jefferson City, Missouri

December 1, 1955

Buisman's Famous Dutch Flavoring creates, when blended with coffee beans, an adulterated product whose sale is prohibited by Sec. 196.015(1), and the distribution to consumers of Buisman's Famous Dutch Flavoring (as presently labeled) is the sale of a misbranded product, the sale of which is prohibited by the same section.

Dear Sir:

The following opinion is rendered in reply to your inquiry which reads as follows:

"We have embargoed a stock of coffee extender which is labeled in part 'Buisman's Flavoring'. We think that the product is misbranded in accordance with Section 196.075, Chapter 196, Revised Statutes, Missouri 1949, and that the use of this product in coffee sold in a restaurant or in any type of a public eating establishment constitutes adulteration, and is a violation of Section 196.070, Chapter 196, Revised Statutes, Missouri 1949.

"It is our understanding that there has been an Arkansas Supreme Court Decision which permitted the sale of 'Buisman's Flavoring' in Arkansas, and that there has been a State of Washington Attorney General's Opinion which permitted the sale of 'Buisman's Flavoring' in the state of Washington. Therefore, we would like to know if we have taken proper action by embargoing this product. We would like to know if we can prohibit the sale of this product in the state of Missouri under its present label in accordance with Section 196.075, Chapter 196, Revised Statutes, Missouri 1949, and can we prohibit the sale of coffee in institutions, restaurants, and other public eating establishments as being adulterated under Section 196.070, Chapter 196, Revised Statutes, Missouri 1949?

Dr. James R. Amos

"We would appreciate it if you would give us an official Opinion concerning 'Buisman's Flavoring'.

Buisman's Famous Dutch Flavoring (hereinafter Buisman's) has been manufactured since 1867 and sold widely throughout Europe and the British Empire. In 1950 it was introduced into the American market, being distributed at first in California. Its ingredients, caramelized starch and calcium phosphate, are not in themselves noxious, and no one has contended that the use of Buisman's jeopardizes health. Labeling, which includes all accompanying literature, asserts the following:

"Increases the yield of your favorite coffee."
"Save up to one-half on coffee."
"Make your coffee taste better - go further."
"Double the yield."

A memorandum, circulated by its distributors, states, in fact, that "if Buisman's is blended with roasted coffee, per directions, on a 5% basis, then one need use the blend in only one-half the quantity that one would use of straight coffee, and get a very satisfactory cup of coffee." The nature of such claims led the Bureau of Food and Drugs to prohibit the sale of Buisman's in Missouri to restaurants, coffee shops, and institutions which mix Buisman's with coffee beans and sell the blend as "coffee." The Bureau has also stated that Buisman's may not be sold to housewives unless more properly labeled as an "extender" or "stretcher" rather than as a "flavoring." The Bureau charges, in short, that the beverage composed of Buisman's and coffee is an adulterated product, and that Buisman's Flavoring is misbranded, under the following statutes:

Section 196.015. "The following acts and the causing thereof within the state of Missouri are hereby prohibited:

"(1) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded;

"(2) The adulteration or misbranding of any food, drug, device, or cosmetic; * * *"

Section 196.070: "A food shall be deemed to be adulterated:

Dr. James R. Amos

"(10) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is; * * *" (Emphasis supplied.)

Section 196.075. "A food shall be deemed to be misbranded:

"(1) If its labeling is false or misleading in any particular; * * *

I.

Buisman's chief attraction is the alleviation of that pressure on the family budget produced by the rapid rise in the price of coffee. As a Buisman's circular points out, "one pound of roasted coffee plus about 10¢ worth of Buisman's brews up to twice as many cups." It is apparent that the sale of a beverage composed of Buisman's and coffee satisfies not only the statutory definition of adulteration, but also the definition advanced by the Missouri Supreme Court in *City of St. Louis v. Beda*, 139 S.W. 441, 236 Mo. 1, at page 6:

"Attending to that statute it deals not only with foreign substances or preservatives injurious to health, but goes on to denounce 'adulterated' milk. 'Adulterate,' means to corrupt, debase, or make impure by an admixture of a foreign or baser substance. (Web. Tit. 'Adulterate.') That standard work illustrates the application of the word. It states that articles are adulterated 'to improve or change their appearance or flavor in imitation of an article of higher grade or of a different kind.' Adulteration is a 'treatment to simulate a better article'--an 'artificial concealment of defects.'"

If the advertising claims are true, adulteration is clear; if such claims are false, a fortiori, the product is misbranded. Since we assume the advertisements to state correctly Buisman's attributes, we are compelled to hold that its mixture with coffee beans would produce an adulterated product, the sale of which is prohibited by Missouri law.

The opinion of the Attorney General of Washington, where the same product and an identical statute were involved, does not,

Dr. James R. Amos

of course, escape our attention. See CCH Food, Drug, Cosmetic Law Reports, Section 85, 146. In his opinion the Attorney General concluded that Buisman's could legally be sold in Washington. The Attorney General noted, however, that there was uncontradicted testimony at a hearing to the effect that Buisman's did not increase coffee bulk or weight (notwithstanding the advertising claims) and, consequently, he felt obliged to hold that, upon the facts with which he was presented, no adulteration existed.

In attempting to construe correctly the Missouri statute, we may examine the federal cases under the Federal Food, Drug and Cosmetic Act, the model after which Missouri patterned its legislation.* It should be noted, of course, that the definitions of adulteration and misbranding in the Missouri act are similar to those in the federal act.

Mr. Chief Justice Stone, discussing the federal law, stated in Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, at page 230, 63 S. Ct. 589 (1943):

"Both the text and legislative history of the present statute plainly show that its purpose was not confined to a requirement of truthful and informative labeling. False and misleading labeling had been prohibited by the Pure Food and Drug Act of 1906. But it was found that such a prohibition was inadequate to protect the consumer from 'economic adulteration,' by which less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished, so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold.* * *"

* 21 U.S.C.A., Sec. 342.

"A food shall be deemed to be adulterated--(b)(4) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is."

Dr. James R. Amos

In regard to the "economic adulteration" sections of the federal law, see, in addition, U.S. v. 716 Cases, More or Less, etc. Del Comida Blend Tomatoes, 179 F. 2d 174 (10th Cir. 1950.)

This beverage, whose ingredients are Buisman's and coffee beans, is to be sold under the name of "coffee." And yet, in U.S. v. O. F. Bayer and Company, 188 F.2d 555 (2nd Cir. 1951), the court stated, at page 557, that:

" . . . it is common knowledge of which a court may take judicial notice, that the drink called 'coffee' is made from roasted coffee beans."

As set forth in United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage, 187 F.2d 967 (3rd Cir. 1951), two conditions must be met in showing a violation of the federal definition of adulteration:

1. That a food exists superior to, and comparable to, the alleged adulterated food;
2. That the average consumer would be easily deceived into thinking the alleged adulterated food is the superior food.

On the facts before us, we believe that "coffee," as defined in U.S. v. O. F. Bayer and Company (supra), is that food to which a mixture of Buisman's and coffee beans may be compared, and that it is the superior food made only of roasted coffee beans which meets the second prerequisite.

We are aware that the recent case of Austin v. Onnes, 278 S.W. 2d 93, construing a statute identical to Missouri's, holds that Buisman's may legally be sold in Arkansas. This case stemmed from a suit to enjoin the Director of Food and Drug Division of the Arkansas Board of Health from interfering with the sale and distribution of Buisman's. The Supreme Court of Arkansas, affirming the injunction granted by the lower court, stated, at page 95:

"The weakness in appellant's contention is in the fact that there is neither a standard nor a definition for what is to be contained in the liquid composing a cup of coffee. The most recently published revision of the Rules and Regulations of the Arkansas State Board of Health was issued in 1952; and it has nothing

Dr. James R. Amos

covering the point at issue. Sec. 19 of Act 415 is the general section allowing promulgation of regulations; but no new regulations have yet been issued under the Act 415. Sec. 9 of the Act 415 gives the State Board of Health the power to '* * * promulgate regulations fixing and establishing for any food or class of food a reasonable definition and standard of identity, and/or reasonable standard of quality and/or fill of container. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Board of Health shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. * * *'. But we know judicially that the State Board of Health has not issued any definition or standard of identity for the liquid in a cup of coffee.

"Meyer v. State. 218 Ark. 440, 236 S.W. 2d 996, was a case involving food adulteration; and we resorted to the dictionary definition for 'bologna', 'wiener,' ' frankfurter' and 'hamburger'. But we cannot resort to the dictionary definition of coffee as a liquid served in a cup, because the dictionaries contain a variety of such definitions. * *"

"* * * In short, neither the dictionary nor common usage afford us any definition or standard as to what is supposed to be contained in the liquid coffee served in the cup. Furthermore the strength of the liquid coffee served in the cup varies greatly as to individual tastes.

"In the light of all these variables, and until the State Board of Health issues regulations fixing and establishing a reasonable definition and standard of identity for the liquid coffee served in the cup, it is not fair to say that Buisman's -- a harmless ingredient -- cannot be sold as a separate product to be added by the purchaser, if so desired, to make the liquid coffee. All liquid coffee is an adulteration of water in one sense of the word, and the adding of Buisman's--if

Dr. James R. Amos

known--is no more an adulteration of water than the ground coffee is itself an adulteration of water.

"Until such time as the State Board of Health, acting under Sec. 9 of the Act 415, duly issues regulations fixing and establishing a standard of identity and quality for the liquid contained in a cup of coffee as sold in this State, we cannot say that the adding of Buisman's is an adulteration; and likewise we cannot say that Buisman's is misbranded because the label states exactly what it is and there is no law that fixes the standard of the product to which it is added."

Squarely opposed to this Arkansas decision is United States v. 36 Drums of Pop'n Oil, 164 F.2d 250 (5th Cir. 1947) in which the court stated clearly, at page 252, that application of the adulteration sections is not dependent upon the prior promulgation of a definition or standard of identity.

"Even in the absence of a reasonable definition and standard of identity, promulgated under 21 U.S.C.A. Sec. 341, truthful labeling does not exempt an article from the provisions of 21 U.S.C.A. Sec 342 (b) (3) and (4), * * *

"In the instant case, mineral oil has been artificially colored and flavored to make it look like butter or vegetable oil. That mineral oil is inferior to melted butter on popcorn is plain. It is also inferior to cocoanut, soybean, or cotton-seed oil. To conclude that a food for which a standard of identity has not been promulgated is exempt from the economic adulteration provisions of the Act would result in rendering inoperative all of 21 U.S.C.A. Sec. 342(b). The Administrator is not required to promulgate definitions and standards of identity for foods under any and all conditions. Administrative selectivity in such standardization is a part of his discretion and responsibility. To permit a class of foods not so selected to escape other applicable provisions of the law would create a loophole which the Act sought to avoid."

Dr. James R. Amos

The average consumer of a Buisman's and coffee bean blend would be unaware that he was drinking a beverage inferior to that which he thought that he had ordered. It must again be emphasized that a necessary factor in showing adulteration is not that the added product was deleterious, but that a less expensive ingredient had been substituted for roasted coffee beans. It seems to us that Missouri statutory and case law defining adulteration, reinforced by federal decisions, would be violated by restaurants', coffee shops', and institutions' mixing this product with coffee beans and selling the final blend as "coffee."

II.

In determining whether this product is misbranded, we must keep clearly in mind that one purpose of the Missouri statute is to prevent injury to the public by prohibiting the sale of products which are not completely and truthfully labeled. The consumer is entitled to assurance that an article which he buys is what it purports to be, and nothing else. See Section 196.010 2, RSMo 1949.*

Printed on a one pound container of Buisman's are the following words:

"Buisman's Famous Dutch Flavoring.
Mix with your favorite brand of coffee
for delicious flavor.

"HOW TO USE AND SAVE MONEY.

-
- *196.010 2. "If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device, sound, or in any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual;" (Emphasis supplied.)

Dr. James R. Amos

"Mix 4/5 oz. (one rounded tablespoon) of Buisman's Famous Dutch Flavoring with ONE LB. of roasted coffee or mix ONE LB (contents of this tin) with TWENTY LB. of roasted coffee; blend thoroughly in a container with plenty of shaking space.

"Use this mixture in any strength desired according to taste.

"CONTAINS NO
CHICORY

CONTAINS NO
CAFFEINE

"Important: To retain the flavor replace lid TIGHTLY and keep in a DRY place. If contents forms (sic) a crust, this is a normal condition and does not affect the purity of the product. It should be mixed in powder form and crushed with a spoon if necessary."

Admittedly, this particular label does not assert that the product may extend or stretch a pound of coffee. The term "labeling" (by which a product may be misbranded) is defined, however, in Section 196.010(10), RSMo 1949, as:

" . . . all labels and other written, printed, or graphic matter upon any article or any of its containers or wrappers, or accompanying such article;
* * *

Assertions that Buisman's may be used as an "extender" or "stretcher" can be found in many examples of its labeling. (See p. 2, supra.) The words found on the one pound container do not, thus, state the entire story which a consumer deserves to know before buying. Taking such claims as correct, and to do otherwise would be to accuse Buisman's of deliberately falsifying its advertising, we are constrained to hold that Buisman's is sold primarily as an "extender" or "stretcher." Buisman's distributors do not emphasize the flavor to be derived from mixing Buisman's with coffee, but rather stress the monetary savings to be effectuated by such blending. We believe that the real applicability of Buisman's "flavoring" should be clearly indicated to the buying public, and that use of the words "extender" or "stretcher" would more nearly meet this requirement than does the present labeling.

Dr. James R. Amos

CONCLUSION

It is, therefore, the opinion of this office that Buisman's Famous Dutch Flavoring creates, when blended with coffee beans, an adulterated product whose sale is prohibited by Section 196.015 (1), and that the distribution to consumers of Buisman's Famous Dutch Flavoring (as presently labeled) is the sale of a misbranded product, the sale of which is prohibited by the same section.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walker La Brunerie, Jr.

Yours very truly,

John M. Dalton
Attorney General

WLaB:vlw:hw

MAGISTRATES:

MAGISTRATE COURTS:

State to pay salaries of employees of the Magistrate Court of Greene County as follows: one chief clerk, \$3300 per annum; one deputy clerk for each magistrate, \$2400 per annum; and such other employees as the court may appoint in an amount not to exceed \$1500 per annum.



March 1, 1955

Hon. Newton Atterbury
State Comptroller
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, in which the following inquiry is made:

What is the total compensation that may be paid by the state for clerk, deputy clerk and employee hire of the magistrate court of Greene County?

We first wish to note that Greene County is a county having a population of more than 70,000 and less than 150,000 inhabitants with two divisions of circuit court which sits at only one place in the county.

Section 483.485, V.A.M.S., provides, in part, as follows:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this section for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be

Hon. Newton Atterbury

required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under this section. * * * In all counties where magistrates organize into a court with divisions there shall be but one clerk of the magistrate court who may act as clerk for one of the magistrates. There shall not be more than one deputy clerk for each magistrate and all deputies shall be under the direction of the clerk but shall be appointed by the court."

This section authorizes the magistrates of all counties to appoint such clerks, deputy clerks and employees as may be necessary for the proper dispatch of the business of the court, and places a limit on the total salaries to be paid by the state. Said section further provides that in counties where magistrates organize into a court with divisions there shall be one clerk of the court and that there shall not be more than one deputy clerk for each magistrate.

Section 483.490, RSMo 1953 Cum. Supp., fixes the maximum limit on salaries paid by the state for such clerks, deputies and employees as follows:

" * * * * "

"(10) In all counties now or hereafter having a population in excess of one hundred thousand inhabitants; except as otherwise provided by law, the sum of four thousand eight hundred dollars for each magistrate in the county.

* * * * * "

Section 483.495, which embraces a class of counties within which the county of Greene falls, makes it mandatory that the magistrates of such county organize into a court with divisions. Said section provides as follows:

"1. In each county of this state now or hereafter having more than seventy thousand and less than one hundred and fifty

Hon. Newton Atterbury

thousand inhabitants, except in counties where circuit court is held in more than one place, and except in such counties which have or may hereafter have more than two divisions of circuit court, the magistrate shall organize as a court with divisions.

"2. And there shall be a chief clerk of the magistrate court who shall be appointed by the various magistrates jointly, and who shall serve at the pleasure of the magistrates and until his successor is duly appointed and qualified. If within thirty days after this section becomes effective the magistrates are unable to agree upon the person to be appointed, the judges of the circuit court of the county shall appoint such chief clerk.

"3. Under the supervision of the magistrates the chief clerk shall perform all duties and have all powers imposed upon clerks of magistrate courts generally. Each magistrate shall appoint a deputy clerk who shall perform his services under the supervision of the chief clerk. The chief clerk shall receive a salary of three thousand three hundred dollars per annum payable monthly, by the state; each deputy clerk shall receive a salary of two thousand four hundred dollars per annum payable monthly by the state; except that in no event shall the state pay more than two deputy clerks."

It is to be noted that this section provides that there shall be a chief clerk of the court appointed jointly by the magistrates who shall be paid \$3300 per annum payable monthly by the state. This section then provides that each magistrate shall appoint a deputy clerk, who shall be paid \$2400 per annum, payable monthly by the state; with the further proviso that in no event shall the state pay more than two deputy clerks.

We wish first to note a cardinal rule of statutory construction, which will serve to guide us in the interpretation

Hon. Newton Atterbury

of the aforementioned statutory provisions, viz., where there are two laws relating to the same subject, they must be read together and provisions of the one having a special application to a particular subject will be deemed to be a qualification of or an exception to the other act general in its terms. *Fleming v. Moore Bros. Realty Co.*, Mo. Sup., 251 S.W. 8.

Under this rule any conflict or repugnancy between Sections 483.485 and 483.495 would have to be resolved in favor of the latter section, since it applies specially to Greene County, whereas the former section is general in nature, applying to all counties.

We are of the opinion that there exists no conflict between the term "clerk of the magistrate court" as used in Section 483.485 and "chief clerk of the magistrate court" as found in Section 483.495, but that the terms "clerk" and "chief clerk" as used are used synonymously. Section 483.485 provides that there shall be one "clerk" of the court, and Section 483.495 by its terms is not in conflict therewith.

Section 483.485 provides that there "shall not be more than one" deputy clerk for each magistrate, and Section 483.495 provides that "in no event shall the state pay more than two deputy clerks." Therefore, again, so far as the state is concerned, in determining the maximum compensation that is to be paid, no conflict exists.

Section 483.495 does not expressly undertake to authorize or limit other employees of the court, and we are of the opinion that such authorization or limitation does not exist by implication. Likewise that portion of Section 483.485 relating to courts with divisions does not refer to other employees. However, the latter section generally does authorize the employment of other employees and limits such employees, insofar as the state is concerned, with the total salaries provided in Section 483.490, *supra*.

Therefore, we are of the opinion that the magistrate court of Greene County may appoint such employees, other than clerks and deputy clerks, which employees may be paid by the state in an amount not to exceed the difference between the total salaries paid for clerk and deputies as provided by Section 483.495, and the total compensation payable by the state under Section 483.490.

Hon. Newton Atterbury

CONCLUSION

Therefore, it is the opinion of this office that the State of Missouri is authorized to pay upon requisition of magistrate judges of Greene County employees of said court as follows: One chief clerk, \$3300.00 per annum; one deputy clerk for each magistrate, \$2400.00 per annum; and such other employees as the court may appoint in an amount not to exceed \$1500.00 per annum.

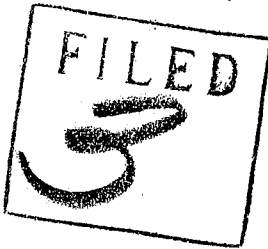
The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

VETERINARY MEDICINE: An unauthorized person may, by proper proceeding, be restrained from the practice of veterinary medicine.



March 16, 1955

Honorable Luther Arnold
Representative, Stone County
Reeds Spring, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"I would like to have your opinion on whether the State Veterinary Board or State Veterinary can, by order, prohibit a person from treating animals where he does not represent himself to be a Veterinarian by title or degree or has no office or does no advertising only the occasional treatment of animals under Senate Bill 354, Laws of 1953, relating to Veterinarians."

You inquire whether the state veterinarian or the Missouri Veterinary Board can, by order, prohibit a person from treating animals under circumstances where the party does not represent himself to be a veterinary by title or degree and only occasionally treats animals. Section 340.020, RSMo 1953 Cum. Supp., provides that it shall be unlawful for any person not licensed as a veterinarian to practice veterinary medicine or to do any act which requires knowledge of veterinary medicine for valuable consideration. Said section more fully provides, in part, as follows:

"It shall be unlawful for any person not licensed as a veterinarian under the provisions of this chapter to practice veterinary medicine or to do any act which

Honorable Luther Arnold

requires knowledge of veterinary medicine for valuable consideration or for any person not so licensed to hold himself out to the public as a practitioner of veterinary medicine by advertisement, the use of any title or abbreviation with his name, or otherwise; * * *

The term "veterinary medicine" is defined in Section 340.010, RSMo 1953 Cum. Supp., as follows:

"(3) 'Veterinary medicine', the practice of alleviating, rectifying, curing or preventing any injury, disease, deformity or physical condition of animals other than human beings and shall include the diagnosing of any affliction, the dispensing or administration of any medicine, appliance, treatment or operation, or the advising, recommending or prescribing the administration or use of any medicine, appliance, treatment, course or program of treatment, or operation on any such animal."

There are certain well-defined exceptions to the practice of veterinary medicine by an unlicensed person treated in Section 340.020, supra. These exceptions are as follows:

" * * * except that nothing in this chapter shall be construed as prohibiting:

"(1) Any person from treating animals where a licensed veterinarian is not available in a reasonable length of time if he does not represent himself to be a veterinarian or use any title or degree pertaining to veterinary practice;

"(2) Any person enrolled in any recognized veterinary school or college working under the direct instructions, control or supervision of a veterinarian who is duly licensed under the laws of this state and whose compensation is paid solely by such licensed veterinarian from doing such acts as the licensed veterinarian may authorize or require;

Honorable Luther Arnold

"(3) Any merchant or manufacturer from selling drugs, medicines, appliances or any other product used in the prevention or treatment of animal diseases not marked by a manufacturer's warning or recommendation that it be used by or on advice of a veterinarian, or any licensed pharmacist from selling any drug, medicine or appliance or other product used in the prevention or treatment of animal diseases so marked upon the prescription of a licensed veterinarian;

"(4) The owner of any animal or animals and the owner's full time, regular employees from caring for and treating any animals belonging to such owner;

"(5) Any nonlicensed veterinarian or other person in the federal service or employ from engaging in the performance of his official duties;

"(6) Any veterinarian residing in another state, lawfully qualified under the laws of that state, meeting licensed veterinarians of this state in consultation;

"(7) Any veterinarian residing near the border of a neighboring state and authorized under the laws of that state to practice veterinary medicine in that state whose practice extends into the limits of this state, from practicing veterinary medicine in this state, but such practitioner shall not open any office or appoint any place to meet clients or prospective clients within the limits of this state."

These exceptions, we believe, are clear, unambiguous and self-explanatory, and therefore need no discussion herein.

Section 340.180 provides that any person violating any of the provisions of Chapter 340 shall upon conviction be deemed guilty of a misdemeanor. Section 340.170 provides that the

Honorable Luther Arnold

Attorney General or any of the several county or circuit attorneys are hereby empowered to sue in the name of the State of Missouri to abate the unauthorized or illegal practice of veterinary medicine. Said section further provides that the Missouri Veterinary Board may also sue in the name of the board to abate such unauthorized or illegal practice. We are unable to find any provision which would authorize the State Veterinary Board or state veterinarian to prohibit an unlicensed person from treating animals in an unauthorized or illegal manner by order. However, the provisions of Section 340.170, authorizing suit either by the Attorney General, county prosecuting attorney, or the State Veterinary Board, are amply authoritative to prohibit the unauthorized practice.

In view of the aforementioned provisions it would appear to be quite clear that a proper proceeding might be instituted to prohibit a person from practicing veterinary medicine without a license as defined in Chapter 340, if such acts do not fall within the exceptions noted in Section 340.020, supra.

CONCLUSION

Therefore, it is the opinion of this office that the State Veterinary Board may, by proper proceeding, abate the practice of veterinary medicine by a person not properly licensed under the provisions of Chapter 340, RSMo, 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

2nd index
STATE COMPTROLLER:

Adoption of expense:
account forms:

: Forms for rendering expense accounts of
: state officers and state employees pro-
: posed by the Division of Comptroller and
: Budget, to be filed with the Secretary of
: State on May 20, 1955, to become effective
: June 1, 1955, are in the public interest
: and are a necessary aid to the Comptroller
: and State Auditor in performance of their
: duties relating to such expenditures and
: should be adopted by the Division.
.....



May 23, 1955

Honorable Newton Atterbury
State Comptroller and
Director of the Budget
Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Mr. Atterbury:

This will be the opinion you requested from this office respecting the adoption of new forms for rendering expense accounts by state officials and employees in the performance of services for the state while away from places where their offices are located. You have supplied this office with a set of the new forms to be used in rendering expense accounts. The pertinent part of your letter of request reads as follows:

"* * * We would appreciate your opinion in regard to the adoption of this new form."

Section 33.040, RSMo 1949, defining the duties of the State Comptroller respecting the incurring of obligations by state officials and state employees and the approval and certification thereof by the Comptroller for the expenditures of state funds reads as follows:

"1. No expenditure shall be made and no obligation incurred by any department without the following certifications:

"(1) Certification by the comptroller pursuant to the provisions of section 33.030;

Honorable Newton Atterbury:

"(2) Certification by the auditor that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it.

"2. At the time of issuance each such certification shall be entered on the general accounting books by the comptroller as an encumbrance on the appropriation and on the allotment; provided, that if the obligation shall not be incurred after such certification shall have been entered on the general accounting books as an encumbrance on the appropriation and on the allotment, such certification shall be removed from the general accounting books as an encumbrance on the appropriation and on the allotment. Any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certifications from the comptroller and the auditor shall be personally liable and liable on his bond for the amount of such expenditure or obligation. To prevent inconvenience and delay, the comptroller and the auditor shall be authorized to establish a system for certification of emergency or anticipated minor obligations and expenditures, and non-budgetary expenditures."

Said Section 33.040 provides in paragraph (1) thereof, that the certification by the Comptroller provided for of such expenditures shall be pursuant to the provisions of Section 33.030, RSMo 1949. Such provisions as they appear in Section 33.030 further defining the duties of the Comptroller read, in part, as follow:

"The division of the budget and comptroller shall have the power and its duties shall be:

* * * * *

Honorable Newton Atterbury:

"(3) To preapprove all claims and accounts and certify them to the state auditor for payment. As a prerequisite to his preapproval of claims and accounts, the comptroller shall ascertain that such claims and accounts are regular and correct. Each such certification from the comptroller to the state auditor shall be accompanied by a copy of the invoice."

Section 33.150, RSMo 1949, providing for the preservation of the original of all accounts and vouchers approved by the Comptroller reads, in part, as follows:

"The original of all accounts, vouchers and documents approved or to be approved by the comptroller shall be preserved in his office; and copies thereof shall be given without charge to any person, county, city, town, township and school or special road district interested therein, that may require the same for the purpose of being used as evidence in the trial of the cause, and like copies shall be furnished to any corporation or association requiring the same, under tender of the fees allowed by law; * * *."

We have observed from the sections hereinabove noted that the Comptroller shall preapprove all claims and accounts submitted to him before certifying the same to the State Auditor for payment; that the Comptroller shall ascertain that such claims and accounts are regular and correct, and that every official and employee of the state who shall make any such expenditure without first securing the certifications of the Comptroller and the Auditor is subject to personal liability.

The provisions contained in the above-noted sections refer primarily, we may assume, to the certification and approval of purchases by various departments, but since there is no exception made of the certification and approval of travel expense accounts incurred, requiring the payment of money, in obligations required to be so

Honorable Newton Atterbury:

certified and approved, we believe such provisions apply in like measure and with like effect, to such obligations as maintenance and expense accounts of state officers and employees in the performance of services for the state at places outside the town of their residence and official domicile where they are authorized by law to perform such services. Rule 3 of the new rules and regulations of the Division of Comptroller and Budget, to be filed with the Secretary of State on May 20, inst., and to become effective on June 1, inst., provides that:

"All claims for reimbursement of expenses must be itemized and sworn to by the claimant and approved by the head of the department or executive officer of the board or commission, or as otherwise provided by the laws of the State of Missouri. This requirement is necessary as the Comptroller's Office must depend on such approvals and certifications of accounts as proof of the correctness and necessity of travel expenses."

Section 33.090 provides that the Comptroller may establish rules to be observed by state officials and state employees who may incur travel expenses. That section states:

"The comptroller shall be empowered to promulgate rules and regulations governing the incurring and payment of reasonable and necessary travel and subsistence expenses actually incurred on behalf of the state, which rules and regulations shall take effect not less than ten days after the filing thereof in the office of the secretary of state."

We have inspected and examined the proposed new forms for making up monthly expense accounts, supplied for our consideration, to be rendered for reimbursement by the makers thereof, and the spaces and lines providing for the items of such expense, based as they are upon the

Honorable Newton Atterbury:

rules, so proposed to be filed with the Secretary of State, and to become effective as stated, and we believe they are in the public interest and are necessary in the proper rendition of such accounts so that the Comptroller and State Auditor may have the facts at hand relating to such expense accounts in order to perform their several respective duties imposed upon them by law in regard to such expenditures.

CONCLUSION

Considering the premises, it is the opinion of this office that the new forms proposed by the Division of Comptroller and Budget, Department of Revenue, for rendering the expense accounts being considered, should be adopted.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

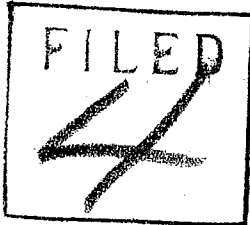
Yours very truly,

JOHN M. DALTON
Attorney General

GWC:irk

COUNTIES:
COUNTY COURT:
UTILITIES:
UTILITY POLES:

A county court must advertise for bids on a contract to remove and relocate utility poles and lines from proposed right of ways of roads in the county, when the contract exceeds \$500.00 and the poles and lines are now on private property.



September 29, 1955

Honorable Henry Balkenbush
Prosecuting Attorney
Osage County
Linn, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"The County Court of Osage County has undertaken to guarantee a right away for a State supplementary road, and on the proposed right of way there are a number of utility poles to be moved the cost of which will be in excess of \$500.00. In view of section 229.050 there is some question whether the County Court is required to advertise for bids for the removal and relocation of the poles or can the court enter into an agreement with the utility that owns the poles for the cost of removing and relocating the poles, wires and etc. connected to and a necessary part of the construction of the utility line.

"The writer is of the opinion that Section 229.050 makes it mandatory on the County Court to obtain bids on this work, but has been unable to find any decisions construing this Section, hence this request for your guidance in the matter; Therefore I request an opinion from your office on this question."

You also stated in your telephone conversation with this office on the 31st of August that the county was, by agreement with the State Highway Commission, to pay for the removal and relocation of such poles and lines, and for the cost of

Honorable Henry Balkenbush

acquiring the right of way, and that the utility poles were on private property.

The question presented is whether, in contracting to relocate the poles and lines from the proposed right of way, the county must advertise for bids for said contract, or can the county without bids contract with the utility company or other persons for the removal or relocation of such poles?

As you state in your letter, it is your opinion that such contracts come within Section 229.050, RSMo 1949, and thus must be advertised for bids and let by bid. Said Section 229.050 reads as follows:

"1. Whenever it shall be ordered by the county court, township board or district commissioner, as the case may be, that any road, bridge or culvert in the county be constructed, reconstructed or improved or repaired by contract, and the engineer's estimated cost thereof exceeds the sum of five hundred dollars, the county, township or district authorities shall order the county highway engineer, or other engineer in their employ, or both such engineers acting together, if so desired, to prepare and file with the clerk of the court, township board or district commissioners, as the case may be, all necessary maps, plans, specifications and profiles, and an estimate of the cost of the work. The court or other proper authority may approve or reject the maps, plans, specifications and profiles and order others prepared and filed.

"2. When the maps, plans, specifications and profiles have been approved, the county, township or district authorities shall order the engineer to advertise the letting of the contract proposed to be let by advertisement in some newspaper published in the county wherein the contract is to be executed, which said advertisement shall be published once a week for three consecutive weeks, the last insertion to be within ten days of the day of letting.

"3. All bids shall be in writing, accompanied by instructions to bidders which shall be furnished

Honorable Henry Balkenbush

by the engineer upon application. All bids on road work shall state the unit prices upon which the same are based. All bids shall be sealed and filed with the clerk of the county court, township board or special road district commissioners, and, on the day and at the hour named in the advertisement, shall be publicly opened and read in the presence of the court, township board or special road district commissioners; and the engineer, and shall then be recorded in detail in some suitable book. All bids shall be accompanied by a certified check equal to ten per cent of the engineer's estimate of cost, payable to the county treasurer, to the use of the county, township or road district, as the case may be, or a bidder's bond executed by some surety company authorized to do business in this state or other good and sufficient surety in a like sum shall be given, as a guarantee on the part of the bidder that if his bid be accepted he will, within ten days after receipt of notice of such acceptance, enter into contract and bond to do the work advertised, and in case of default forfeit and pay sum of ten per cent of the engineer's estimate of cost.

"4. The contract shall be awarded to the lowest responsible bidder. The court may in its discretion reject any or all bids. Any bid in excess of the engineer's estimate of the cost of the work to be done shall be rejected. When it shall be decided by order of record to accept any bid, the county, township or district authorities shall order a contract to be entered into by and between the bidder and the county, township or special road district, as the case may be. The contract shall have attached to and made a part thereof the proposal sheet, instructions to bidders, the bid, maps, plans, specifications and profiles.

"5. Whenever the contract is executed and approved by order of record and endorsement thereon, it shall be filed and preserved as a permanent record. It

Honorable Henry Balkenbush

shall be incorporated in the contract that the county, township or special road district shall reserve the right to make any additions to, omissions from, changes in or substitutions for the work or materials called for by the drawings and specifications, without notice to the surety on the bond given to secure the faithful performance of the terms of the contract. The bidder must agree that before the county or political subdivision shall be liable for any additional work or material, the county or political subdivision must first order the same, and the cost thereof must be agreed upon in writing and entered of record before such additional work shall apply in case of omissions, deductions or changes, and the unit prices shall be the basis of the values of such changes.

"6. In case of disagreement upon the cost or price of any addition, omission or change ordered or so desired, then it is expressly agreed that the decision of the state highway engineer shall be received and accepted as fixing definitely and finally the cost of such change, and when so fixed, the court, township board cost or price of any addition, omission shall enter of record such change. It shall also be provided in the contract that the contractor will furnish and promptly pay for all labor employed and materials used in the performance of such contract."

If such a contract as contemplated in your letter comes within the above cited section, then it must be let by bid. But the question remains, does such contract come within that section? The contracts stated within the above section, which must be let by bid, are those having to do with the construction, reconstruction, improvement or repair of any road, bridge, or culvert in the county. The only possible part of that section that this contract can come under is that it be an improvement or repair of a road.

In *Cohn v. City of Missoula*, 144 P. 1087, the Supreme Court of Montana held that the opening and widening of a street and the acquisition of property therefor, was an improvement of a street.

Honorable Henry Balkenbush

In Pratt v. City of Seattle, 189 P. 565, the Supreme Court of Washington held that the word "improvement" as used in a city ordinance changing a street grade meant the acquisition of property rights as would enable the city to later improve the road.

In McCormick v. Allegheny County, 106 Atl. 203, the Supreme Court of Pennsylvania held that the laying of a sidewalk along a road by the county was an improvement of the county road.

Thus, it would seem from the cases cited above that the acquisition of a right of way or the construction of a sidewalk would be an improvement to the road and following this reasoning it would seem that the removal and relocation of poles and lines of a utility company from a right of way made necessary in order to widen the road would be an "improvement" of the road and thus, any contract for such removal or relocation of the utility poles and lines would come within Section 229.050, RSMo 1949, and such contract would have to be advertised for bids and let by bid.

CONCLUSION

It is the opinion of this office that a county court must advertise for bids and let by bid a contract to remove and relocate utility poles and lines from proposed rights of way of roads in the county when the contract exceeds five hundred dollars and the poles and lines are now on private property.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

Yours very truly,

John M. Dalton
Attorney General

HEV:vlw

MOTOR VEHICLES:) 1) "Receiving a Record", of an
DRIVERS' LICENSES:) operator's or chauffeur's conviction
REVOCATION OF:) in a circuit or magistrate court as
SENATE BILL NO. 251:) used in Sec. 302.271, Senate Bill
68th GENERAL ASSEMBLY:) No. 251, 68th General Assembly, has
reference to final judgment entered

of record in said court convicting defendant of an offense referred to in section, for which it is mandatory duty of the trial court to revoke the license of said defendant. 2) One convicted of any offense under provisions of Section 302.271, and judgment final, magistrate judge can revoke driver's license of convicted defendant but not for any specified period of time. 3) One convicted in magistrate court of careless and imprudent driving of a motor vehicle, and evidence conclusively shows defendant to be under influence of intoxicating liquor at the time offense is alleged to have occurred, magistrate court cannot revoke driver's license under Subsection 2, Section 302.271, Senate Bill 251, authorizing revocation of driver's license upon conviction of one driving a motor vehicle while he is under the influence of intoxicating liquor or a narcotic drug.

August 19, 1955

Honorable Harold W. Barrick
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Sir:

This department is in receipt of your recent request for a legal opinion, reading as follows:

"At the request of the Magistrate Judge of Pettis County, I propound the following questions to your office and request an official opinion on those questions for the Magistrate. The questions are as follows:

"1. In Senate Bill No. 251, Section 302.271, what does the word "receiving a record" mean?

"2. Question: 'A driver's license in Missouri is granted for a period of three years.' Assume that the defendant has been granted a license to drive an automobile in Missouri and after thirty days he is convicted under Senate Bill No. 251, Section 302.271, and his driver's license is revoked, by the Magistrate. Is it mandatory to revoke said defendant's license until it expires, i.e., for two years and eleven months?

Honorable Harold W. Barrick

"3. Senate Bill No. 251, Section 302.271. Assume that the defendant is charged in the Magistrate Court for careless and imprudent driving, in that he did allow his motor vehicle to weave back and forth on the highway, etc. The evidence adduced at the trial showed conclusively that the defendant was under the influence of intoxicating liquor at the time. Under this Section and these facts, does the Magistrate Court have jurisdiction to revoke the defendant's driver's license under Sub-Section 2 of this Section, 'driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug', and is it mandatory to revoke said license?

"Thank you very much for your help and assistance in this matter."

Section 302.271, Senate Bill No. 251, 68th General Assembly repealed Section 302.271, and certain other sections of the RSMo Cumulative Supplement 1953, relating to operator's and chauffeur's licenses and enacted seven new sections relating to the same subject. This bill has passed both houses of the Legislature and will become effective August 29, 1955. Section 302.271 of the bill reads as follows:

"302.271. The director, circuit judge or magistrate shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction in any circuit or magistrate court of any of the following offenses, when such conviction has become final:

"(1) Manslaughter resulting from the operation of a motor vehicle:

"(2) Driving a motor vehicle under the influence of intoxicating liquor or a narcotic drug:

"(3) Any felony in the commission of which a motor vehicle is used:

"(4) Leaving the scene of an accident knowing that injury has been caused to a person

Honorable Harold W. Barrick

or damage has been caused to property without stopping and giving his name, residence, including city and street number, to the injured party, or to a police officer, or to other proper person, as required by law;

"(5) Perjury or the making of a false affidavit to the department of revenue under this chapter or under any other law relating to the ownership or operation of motor vehicles;

"(6) Conviction or forfeiture of bail not vacated, upon three charges of careless or reckless driving committed within a period of two years;

"(7) Any offenses involving the careless and reckless operation of a motor vehicle which has resulted in the death of another."

The first inquiry requests an explanation of the words, "receiving a record" as they are used in the above quoted section. No definition of said terms are given in the section, and in order to ascertain the intended meaning of same we must look to other parts of Chapter 302, RSMo 1949, and possibly other sources. All applicable portions of the chapter must be read and construed along with Section 302.271, in arriving at the intended meaning of the words "receiving a record of conviction."

Ordinarily the term "record of conviction" refers to a written record of the court proceeding showing one has been convicted of a criminal offense of which he stands charged, and that he has been sentenced and judgment rendered against him by the court, in accordance with the applicable criminal statutes of the state in which the court has been granted jurisdiction in such case.

Court records of this nature, assuming they have been kept in the manner provided by Missouri statutes, are authentic histories of the proceedings they recite, and if properly certified to by the clerk of the court, shall be received as evidence of the acts or proceedings of such court, in any court in this state, as provided by Section 490.130 RSMo 1949.

In commenting upon the meaning of the term "record of conviction" as in the case of *Commonwealth v. Minnick*, reported in 250 Pa. 363, the Supreme Court of Pennsylvania said at l.c. 367:

Honorable Harold W. Barrick

"'Record of conviction' is a common law term; it follows that it is both legal and technical. Why then shall it not have its legal technical meaning imputed to it when we find it employed in a rule relating to a subject matter as to which it has acquired such meaning? Rules of construction require such meaning to be given technical terms when they appear in enactments, whether civil or criminal in their character, except where a contrary intent is disclosed. * * *"

"'* * * When the law speaks of conviction, it means a judgment and not merely a verdict which in common parlance is called a conviction.' * * *"

From that part of the court's opinion quoted above we understand the record of conviction of a defendant must show either a plea of guilty, or a verdict of guilty by a jury, convicting defendant of the formal criminal charge alleged against him, and the judgment of the court based upon the plea or verdict.

In the instant case, the record of conviction would be the original court record showing the defendant has plead guilty, or has been found guilty, by a jury at a trial in the court having jurisdiction, of any one of the seven criminal offenses mentioned in Subsection 1 to 7, Section 302.271, supra, alleged against him.

From the reading of Section 302.271 it is obviously the legislative intent that in these instances when a defendant is convicted of any of the offenses mentioned therein, the judgment is entered of record and has become final, that it shall be the mandatory duty of the trial court to forthwith revoke the defendant's license.

It further appears to be the legislative intent as expressed in Section 302.225, RSMo Cumulative Supplement 1953, that the trial court shall furnish the director of revenue with a "record of conviction" of the defendant in such court. Said section reads as follows:

"1. Whenever any person is convicted of any offense or of the last of a series of three offenses for which this chapter makes mandatory the revocation of the operator's

Honorable Harold W. Barrick

or chauffeur's license of such person by the director, the circuit court or magistrate court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses, then held by the person so convicted, and the court shall within ten days thereafter forward the same, together with a record of such convictions to the director.

"2. Every court having jurisdiction over offenses committed under this chapter, or any other law of this state or municipal ordinance regulating the operation of vehicles on highways shall within ten days thereafter forward to the director upon forms to be furnished by the director a record of the conviction of any person in said court for a violation of any of said laws or ordinances other than nonmoving traffic violations, together with the record of any action taken by the court in suspending or revoking the license of such person.

"3. No municipal court or municipal official shall have power to revoke any operator's license or chauffeur's license; but, in addition to all other jurisdiction heretofore given by law, the municipal court of any city of this state which now has or which may hereafter have more than three hundred thousand inhabitants shall have power and jurisdiction to suspend the license of any operator or chauffeur to operate a motor vehicle within the corporate limits of the municipality in which such offense was committed and where such municipal court otherwise has jurisdiction, for a period of not to exceed three months; such suspension shall be ordered only for any of the causes given in sections 302.271 and 302.281 authorizing revocation and suspension of licenses by the director.

"4. The magistrate courts of each county and the circuit courts of the various counties of this state shall have power to suspend for the causes herein provided for a period not to exceed one year the license of any operator or chauffeur to operate a motor vehicle within

Honorable Harold W. Barrick

the entire state, and any circuit court or magistrate court may revoke for the causes herein provided the license of any such operator or chauffeur to operate a motor vehicle within this state, whether the case is on appeal or has originated in such court.

"5. Whenever any person is convicted of any offense in connection with which the court trying the person charged with the offense orders the suspension of the license of any operator or chauffeur to operate a motor vehicle, the court shall note the fact on the back of the license that the holder's right to drive a motor vehicle in such jurisdiction has been suspended for the period stated.

"6. Every court or municipal official trying any person charged with violations of this law or of any city motor vehicle traffic ordinance in determining the penalty may take into consideration prior convictions of all violations of state motor vehicle traffic laws or county or municipal traffic ordinances of any such person and the abbreviated record of such convictions appearing on the back of his license shall be deemed prima facie proof thereof."

From Subsection 1 of this section we note that the circuit or magistrate court in which a defendant is convicted of any offense, or a series of three offenses, for which the chapter makes mandatory the revocation of defendant's operator's or chauffeur's license and that the trial court order the surrender of the revoked license within ten days thereafter, the court shall forward such license to the director of revenue together with a record of conviction.

No explanation of the record of conviction is given here although it is more particularly described in Subsection 2, of the same section.

Subsection 2 of said section states that the courts having jurisdiction over the offenses committed under the chapter, any other state law, or municipal ordinance regulating the operation of motor vehicles upon the highways, shall within

Honorable Harold W. Barrick

ten days thereafter forward to the director of revenue a record of conviction of any person for any such violation, together with a record of any action taken by the court in the suspension or revocation of the operator's or chauffeur's license of the convicted person. The record of conviction referred to here is required to be shown upon forms furnished by the director of revenue and, when completed, such forms must be returned to the director by the trial court.

Apparently the forms to be completed and returned to the director of revenue are for the convenience of the director in keeping his records and in performing the duties imposed upon him by statute. In the event the trial court has not been supplied with blank forms it is believed that such court might properly send the director a certified copy of the court record showing the conviction of the defendant, within ten days of such conviction, and that his action in so doing would be a sufficient compliance with the provisions of Section 302.225, supra.

In answer to the first inquiry it is our thought that when a defendant is convicted of any one of the seven offenses mentioned in Section 302.271, Senate Bill No. 251, supra, in a circuit or magistrate court, said judgment is entered of record and has become final, the operator's or chauffeur's license of the convicted defendant shall forthwith be revoked by said court. That when such judgment has been duly entered of record, the trial court will then be "receiving a record" of such conviction within the meaning of the terms as used in Section 302.271, supra.

Your second inquiry states that operator's and chauffeur's licenses are issued for a period of three years. You assume a case in which the defendant was convicted of an offense under the provisions of Senate Bill No. 251, for which his operator's or chauffeur's license must be revoked, and then inquire if the revocation shall be for the unexpired period for which the license was in effect at the time of the conviction, or two years and eleven months.

Section 302.271, supra, or any other section of the statutes does not provide that upon revocation of an operator's or chauffeur's license by a circuit or magistrate judge, that the order of revocation shall specify the date when the revocation is to begin and when it is to end, or that such revocation shall continue for any particular length of time.

The General Assembly has not seen fit to enact any laws of this nature, and until it does so, it is our thought that a trial

Honorable Harold W. Barrick

circuit, or magistrate judge is unauthorized to revoke a convicted defendant's operator's or chauffeur's license for any certain period of time. Said court has power, and under such circumstances shall revoke such a defendant's license, but shall not place a time limit on the revocation.

Our answer to your second inquiry is, that the trial circuit, or magistrate judge shall revoke the convicted defendant's license, but cannot revoke it for two years and eleven months, or for any other specified period of time.

The third inquiry assumes that one is on trial in magistrate court for the charge of careless and imprudent driving of a motor vehicle and it is conclusively shown by the evidence that at the time the offense is alleged to have been committed the defendant was under the influence of intoxicating liquor. The inquiry is whether or not under these circumstances the trial magistrate has jurisdiction to revoke the defendant's operator's or chauffeur's license under the provisions of Subsection 2, Section 302.271, Senate Bill No. 251. In effect the subsection requires the director of revenue, any circuit, or magistrate judge, to revoke the license of one convicted of driving a motor vehicle while he is under the influence of intoxicating liquor or a narcotic drug.

From the facts related in the third inquiry, it appears that the defendant had been charged with the criminal offense of driving a motor vehicle in a careless and imprudent manner, and was on trial for that offense. It does not appear that the defendant was convicted, but for the purpose of our discussion it will be assumed that he was convicted, and that the judgment rendered against him has become final.

Under these circumstances the trial court would lack the power to revoke the license of the defendant, since the defendant has not been convicted of any offense mentioned in Section 302.271, or in any other portion of Chapter 302, RSMo 1949, for which his license could be revoked. In an opinion of this department rendered to Honorable M. E. Morris, Director of Revenue, upon September 22, 1954, it was held that the director was unauthorized to suspend or revoke the operator's or chauffeur's license of one convicted of careless and reckless driving. We enclose a copy of that opinion for your convenience.

Again, in view of the facts mentioned in the third inquiry that defendant had been charged, tried and convicted of the offense of driving a motor vehicle in a careless and imprudent manner and had not been convicted of driving a motor vehicle while he was

Honorable Harold W. Barrick

under the influence of intoxicating liquor or a narcotic drug, the director of revenue, any circuit court, the trial magistrate or any other magistrate judge would be legally unauthorized and would lack the power to revoke the operator's or chauffeur's license of the defendant. The magistrate referred to could not revoke the defendant's license for still another and more important reason. Driving a motor vehicle while one is under the influence of intoxicating liquor is a felony, and magistrate courts have never been granted jurisdiction to try felony cases in Missouri.

In point with our reasoning given in the preceding paragraph is an opinion of this department rendered to the Honorable John M. Cave, Prosecuting Attorney of Callaway County, upon October 16, 1952. The opinion held that the circuit and not the magistrate court had jurisdiction to try one for driving a motor vehicle while he was under the influence of intoxicating liquor, which charge is a felony, and that the magistrate court could not revoke the defendant's license under these conditions. A copy of that opinion is enclosed for your consideration.

In answer to the last inquiry, it is our thought for the reasons given above, that the trial magistrate referred to in such inquiry, lacks the power and cannot revoke the operator's or chauffeur's license of the defendant.

CONCLUSION

It is the opinion of this department that:

1) The term "receiving a record" of an operator's or chauffeur's conviction in a circuit or magistrate court as used in Section 302.271, Senate Bill No. 251, 68th General Assembly, which will become effective on August 29, 1955, has reference to the final judgment entered of record in said court convicting a defendant of any one of the offenses referred to in said section, for which it is the mandatory duty of the trial court to revoke the operator's or chauffeur's license of said convicted defendant.

2) When one is convicted of any criminal offense under the provisions of Section 302.271, Senate Bill No. 251, the judgment has become final, and for which the convicted defendant's operator's or chauffeur's license shall be revoked,

Honorable Harold W. Barrick

a magistrate judge has the power to revoke the defendant's un-revoked license, but cannot revoke same for any specified period of time.

3) When one is convicted of driving a motor vehicle in a careless and imprudent manner in a magistrate court, the judgment has become final and during the trial the evidence conclusively showed the defendant was under the influence of intoxicating liquor at the time the offense alleged against him occurred, the trial court lacks the power and cannot revoke defendant's operator's or chauffeur's license under provisions of Subsection 2, Section 302.271, Senate Bill No. 251, authorizing revocation of the license of one convicted of driving a motor vehicle while he was under the influence of intoxicating liquor or a narcotic drug.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

Enclosures - John M. Cave
10-16-52

M. E. Morris
9-22-54

PNC:ma,vlw

TREASURER: The county court may pay compensation to or
COUNTY TREASURER: reimburse the county treasurer for compensa-
COUNTY OFFICERS: tion paid to a clerk in the Treasurer's office
COUNTY COURT: where it appears that such expenditures are
indispensably necessary to the conduct of the
office, if the County Budget Law is complied
with.

September 21, 1955

Honorable Harold W. Barrick
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

You have recently asked this office for an opinion concerning the following matter:

"Is it legal for the County Court of a Third Class County to either pay the salary of a clerk in the County Treasurer's office or reimburse the County Treasurer for the clerk's salary when the Treasurer pays the same?"

It appears that Pettis County is not organized under township organization and, therefore, such cases as *Alexander v. Stoddard County*, (Mo. Sup.), 210 SW2d 107, which are based upon specific statutes applying only to counties under township organization have no application to your problem.

It appears from the case of *Buchanan v. Ralls County*, 283 Mo. 10, 222 SW 1002, that the county treasurer is entitled to be supplied at county expense with an office, heat, light, janitor service and other necessities to the conduct of his county office, and that if the county refuses to provide such services, he may recover from the county his reasonable expenditures therefor.

As is pointed out in *Ewing v. Vernon County*, 216 Mo. 681, 116 SW 578, such matters of expenditure to obtain supplies or services necessary to the conduct of the office are to be contrasted to and differentiated from additional compensation to the officer himself, and that the officer is entitled to have such necessary supplies and services supplied to him by the county, and if the county unreasonably refuses to supply the same, he may make the necessary expenditures therefor and recover the same from the county. Thus the Missouri Supreme Court, in considering this matter in the above quoted case, said, 1.c. 216 Mo. 695:

Honorable Harold W. Barrick

"The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

In this connection, see also Harkreader v. Vernon County, 216 Mo. 696, 116 SW 523.

While the foregoing cases refer primarily to supplies and kindred matters, the case of Rinehart v. Howell County, 153 SW2d 381, 348 Mo. 421, dealt especially with personal services. Here the prosecuting attorney of Howell County had employed a stenographer and paid her compensation out of his own funds. He then brought suit to recover such amount from the county. The court, in allowing recovery, pointed out that it was uncontroverted in the case that the services of such stenographer were indispensable outlays in the discharge of the official duties of the prosecutor. The court again emphasized the difference between such outlays and additional compensation to the officer. The court, in reaching the conclusion allowing recovery, said, l.c. 153 SW2d 383:

"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected--an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if

Honorable Harold W. Barrick

indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. * * *

The court was careful to point out that any defense the county might have under the County Budget Law had not been properly raised and was not a live issue in the case.

In a similar case, that of Bradford v. Phelps County, 210 SW2d 996, 357 Mo. 830, the court again had under consideration the matter of compensation of a stenographer employed by the prosecuting attorney. In this case the budget law had been complied with. The prosecuting attorney submitted an estimate of seventy-five dollars per month as compensation for his stenographer. The county court, in its budget as finally passed, allowed only fifty dollars per month for such services. The prosecuting attorney proceeded to pay the seventy-five dollar amount, and brought suit for the difference. The court pointed out that such services were proper inasmuch as the hiring of stenographers and the payment of their compensation was authorized in counties of larger population, and held that since there was no specific statutory authorization for the hiring of a stenographer by the prosecuting attorney and her compensation by the county that such matter was, under the County Budget Law, left to the discretion of the county court, and that their action on such matter would be upheld as long as such action was in the pursuance of their honest, nonarbitrary performance of duty. In reaching this conclusion, the court said, 1.c. 210 SW2d 1000:

"Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see Laws of Missouri, 1945, pp. 574, 578, and 583, Mo.R.S.A. Secs. 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting

Honorable Harold W. Barrick

attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government. To put it in another and summary way--since Prosecuting Attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make. * * *

In a later case involving a similar situation, the prosecuting attorney requested the county court to include within its budget compensation for his stenographer. The county court, after considering the matter, refused to include within its budget any amount for compensation of the stenographer to the prosecuting attorney. The prosecuting attorney then paid his stenographer out of his own funds and brought suit to recover such amount from the county. The court again pointed out that since there was no specific statutory authority for appointing and compensating a stenographer for the prosecuting attorney, such matter was, under the County Budget Law, a proper expenditure of the county in the discretion of the county court, and that when said county court acted upon such matter in a nonarbitrary and reasonable fashion, the decision of the county court was final and the prosecuting attorney could not recover. This was the case of *Miller v. Webster County*, (Mo. Sup.), 228 SW2d 706, where in reaching its conclusion, the court said, *l.c.* 708:

"* * * This is not to deny in every instance certain specific items of expense merely because they are not provided for by statute.

Honorable Harold W. Barrick

For example, where the 'officer is performing a duty enjoined on him by statute necessarily expends his own funds, there being no statutory provision for meeting these expenses out of the public treasury, he may be reimbursed for such expenses.' Maxwell v. Andrew County, 347 Mo. 156, 164, 146 S.W.2d 621, 625; Ewing v. Vernon County, supra. And in this case reimbursement is not denied merely because the statutes relating to prosecuting attorneys make no provision for stenographers or stenographic hire in counties of the third and fourth class. But, since the statutes relating to prosecuting attorneys in certain other classes of counties do make provision for stenographic hire and the statutes relating to prosecuting attorneys in third and fourth class counties make no such provision, the plain implication of the statutes and particularly of the County Budget Law is that the County Courts in those counties have been invested with the discretionary quasi-legislative function and duty, State ex rel. Dietrich v. Daues, 315 Mo. 701, 287 S.W. 430, of determining the necessity and amount of expenditures not otherwise specifically provided for by statute.* * *

An examination of the statute concerning county treasurers reveals that in larger counties the hiring of clerks is authorized and their compensation is set, but no such provisions are found applicable to third class counties. This situation thus is the same as that considered in the above cases and it is therefore submitted that such cases control the answer to your question.

CONCLUSION.

From the foregoing, it is the conclusion of this office that it would be perfectly proper for the county court, in considering its budget, to include therein an amount for compensation of a clerk in the office of the county treasurer if in its sound discretion and acting in a nonarbitrary fashion the county court decides that the expenditure is reasonably necessary for the discharge of

Honorable Harold W. Barrick

the official duties of the treasurer. In the absence of such action by the county court, it would appear that if the treasurer paid a salary to a clerk in his office out of his own funds, such amount might be recoverable if the services rendered were indispensably necessary to the performance of his official duties but that unless provisions of the County Budget Law were complied with, the treasurer could not recover such amounts from the county if the county properly raised the defense of the County Budget Law in such suit.

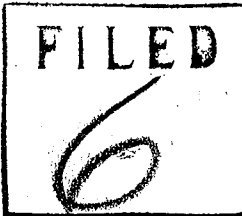
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:sm

COUNTY COURT: In keeping record of proceedings of county court, county clerk should obey direction
COUNTY CLERK: of majority of court.



July 15, 1955

Honorable William T. Bellamy, Jr.
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Bellamy:

This is in response to your request for opinion dated June 25, 1955, which reads as follows:

"The Presiding Judge of our County Court has propounded to me a problem which I am at a loss to answer. I would sincerely appreciate an opinion from you at your earliest convenience on the general question as to whom determines the items included in the record of proceedings kept by the County Court.

"In this particular case, the Presiding Judge desires certain things included in the record of proceedings of the County Court which the County Clerk and the other two Judges do not desire included. In this connection I should like to direct your attention to Article VI, No. 7 of the Constitution of 1945 which merely provides that a county court shall 'keep an accurate record of its proceedings.' I should also like to direct your attention to Section 51.120 of the Revised Statutes of Missouri for 1949 which directs that this accurate record shall be kept by the County Clerk. In this connection you may also find helpful State ex rel Caldwell vs. Cockerell, 280 Mo. 269 and State ex rel Attorney General vs. Hickson, 41 Mo. 210.

"It would seem clear to me that whenever two judges of the County Court desire something included in the records, that the County

Honorable William T. Bellamy, Jr.

Clerk would have no other alternative than to record it as they directed. However, where only one judge of the County Court desires something included, I am definitely in need of advice. It would seem to me that, for example, a Presiding Judge who is required to sign county warrants would have the authority to get the fact that a warrant was issued by authority of the court into the court record."

Although since the adoption of the 1945 Constitution county courts are no longer courts of record in the juridical sense (Rippeto v. Thompson, 358 Mo. 721, 216 S.W. (2d) 505; State ex rel. Kowats v. Arnold, 356 Mo. 661, 204 S.W. (2d) 254; Bradford v. Phelps County, Mo., 210 S.W. (2d) 996), they are nevertheless still required to keep records of their proceedings.

Section 7, Article VI, Constitution of Missouri, 1945, reads as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

By Section 51.120, RSMo 1949, the county clerk is required to keep these records. That section reads, in part, as follows:

"Every clerk of a county court shall keep an accurate record of the orders, rules, and proceedings of the county court, and shall make a complete alphabetical index thereto; * * *"

With regard to this duty of the clerk, the Supreme Court of Missouri, in the case of State ex rel. Attorney-General v. Bowen, 41 Mo. 217, 219, said:

" * * * The office of the clerk of the County Court is essentially ministerial in its character. So far as the entry of the orders of the court are concerned, or

Honorable William T. Bellamy, Jr.

the performance of any other act or thing which may be legally and properly required of him by the court, he is without discretion; he has no power to judge of the matter to be done, and must obey the mandates of the tribunal whose officer and servant he is. * * *

Although in certain instances the county clerk would be justified in relying upon orders from the presiding judge alone (Boggs v. Caldwell County, 28 Mo. 586), as a basic proposition the court must act as a body legally assembled (Sec. 49.070, RSMo, Cum. Supp. 1953; 15 C.J., Counties, Sec. 107, page 459; Missouri-Kansas Chemical Company v. Christian County, 352 Mo. 1087, 180 S.W. (2d) 735).

In speaking of the duties of the county clerk, it is said in 15 C. J., Counties, Section 178(b), page 510, that in jurisdictions where he is to perform all clerical services which naturally attach to that position in connection with matters controlled by the county court and within its authority, and which would be necessary to enable it fully to perform its duties in relation thereto, the clerk should attend meetings of the court and keep records of its proceedings in accordance with its directions. In other words, the record and matters which are to be made of record are subject to the control of the court as a body.

Therefore, we are of the opinion that if there is a dispute between the presiding judge and other members of the court as to whether or not something should be made a matter of record, the majority should prevail as being the will and action of the court.

CONCLUSION

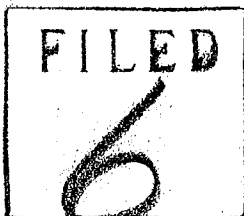
It is the opinion of this office that if the presiding judge of the county court and the other members thereof disagree as to what shall be made a matter of record, the county clerk should follow the direction of the majority as being the action of the court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

PROSECUTING ATTORNEYS: Social Security payments.



August 30, 1955

Honorable William T. Bellamy, Jr.
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Bellamy:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"On December 18, 1954, I requested an opinion from your office as to whether or not the secretary to the prosecuting attorney and also to the county treasurer in a third class county should be paid directly by the county court or whether they should be paid by the county officer involved from his own personal funds and then reimbursement made to him by the county court from county funds, if the county court felt that the employment of a secretary was necessary to the proper function of the office.

"In response to my request for an opinion I received your letter of December 27, 1954, stating that an individual employed by the prosecutor of a third class county for secretarial services does not become a county employee and that the county could reimburse the prosecutor for necessary outlays for stenographic services but that payment should be made to the official and not to the employee. * * * I believe in my original letter I also asked the question, although I do not believe the opinion fully covered it, as to whether or not the prosecuting attorney would also be entitled to reimbursement from the county court for the employer's share of the Social Security

Honorable William T. Bellamy, Jr.

paid for the secretary. In other words, in this county the prosecuting attorney is reimbursed by the county court for a full-time secretary in the actual amount of the salary paid to her by the prosecuting attorney. From this amount the prosecuting attorney withholds the employee's share of the Social Security but is forced to pay from his own pocket the employer's half of the Social Security.

"My question is whether or not the prosecuting attorney is entitled to reimbursement for the employer's half of the Social Security in addition to the salary already agreed upon by the county court."

As stated in your request, this office did issue to you an opinion under date of December 27, 1954, holding that "in the event proper budget requirements have been met such county may reimburse the prosecuting attorney for necessitous outlays for such stenographic services." The opinion further held that such person hired to perform stenographic services is an employee of the prosecuting attorney and not an employee of the county. In view of this fact, and in view of the existing Federal law relating to Social Security contributions, the prosecuting attorney, as an employer, would be required to file Social Security reports and remit both employer and employee contributions. The employer's contributions required to be paid by the employer are, under such facts, directly related to the services performed by such employee, and in view of the fact that the work is such that the prosecuting attorney may be reimbursed therefor, we are of the opinion also that he may be reimbursed for the employer's contributions actually paid, such constituting a necessitous outlay.

CONCLUSION

Therefore, it is the opinion of this office that a prosecuting attorney of a county of the third class may, in the event proper budget requirements have been met, be reimbursed for employer's Social Security contributions actually paid in connection with outlays for stenographic services.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

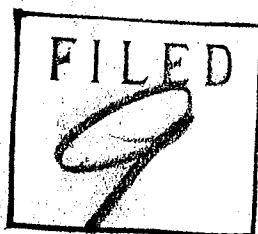
Yours very truly,

John M. Dalton
Attorney General

DDG:mw

SEARCH AND SEIZURE:
CONSTITUTIONALLY CHARTERED CITIES:

Municipal Court, chartered
city, unauthorized to issue
warrants for search and
seizure.



March 1, 1955

Honorable Cowgill Blair, Jr.
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"Under our new home rule Charter here it is provided that the Municipal Judge shall have the same power to issue warrants for search and seizure as authorized for circuit judges and magistrates upon application of the City Attorney, with the warrants to be issued and directed to the Chief of Police. As I understand it, our State statutes provide for the issuance of search warrants by circuit judges and magistrates and do not mention anyone else.

"Our City police have been searching and seizing stolen property upon warrants issued by the Municipal Judge, using the same form as the magistrate upon application of the City Attorney and directed to the Chief of Police. Where felonies are involved, this office will have to rely upon such evidence in the Magistrate and the Circuit Courts.

"I would, therefore, appreciate your furnishing me your opinion, at a time convenient to you, as to the validity and legality of the Charter provision providing for such search and seizure. This provision is contained in Article IX, Section 9.01, Municipal Court: Jurisdiction and Powers, which reads

Honorable Cowgill Blair, Jr.

as follows: 'There shall be a municipal court which shall have jurisdiction as prescribed herein or by law or ordinance to . . . issue warrants of arrest, and search warrants or warrants for search and seizure as authorized by law for circuit judges or magistrates, directed to the chief of police or other police officers of the city upon application of the city attorney, assistant city attorneys, chief of police, or other police officers. . . .'

You specifically inquire as to the validity of Article IX, Section 9.01 of said charter quoted in your request. This request presents a legal question of first impression and we find no authority directly in point.

The City of Joplin is now constituted and known as a constitutionally chartered city created by virtue of Section 19, Article VI, Constitution of Missouri, 1945, said city having adopted a charter by majority vote of its electors in conformity with the foregoing constitutional provision.

The only constitutional amendment in the Constitution of Missouri dealing specifically with search and seizure is known as Section 15, Article I. However, it does not provide what courts shall issue such warrants or who shall serve them, but merely that the people of the State of Missouri shall be safe against unreasonable search and seizures.

Section 19, Article VI, supra, authorizes cities having over ten thousand inhabitants to frame and adopt a charter for its government, and provides that provisions of the charter must be consistent with and subject to the Constitution and laws of this state in a certain manner, namely, by ordinance submitting the question to the voters of said city, whether or not the city chooses a commission to frame a charter. Following this is a provision for the number of candidates for said commission by a petition. Said commission shall then draft said charter, and when this is done it is submitted at an election for the approval of the voters. If approved, it further provides for certified copies thereof to be filed in the office of secretary of state and city recorder, respectively.

There are various statutes authorizing the issuance of warrants for search and seizure by various and sundry officials under certain specified conditions; however, there is no statute

Honorable Cowgill Blair, Jr.

specifically vesting such authority in a municipal court in such a chartered city. See Sections 84.270, 84.300, 84.660 and 252.100, RSMo 1949. As a general rule it has been fairly well established by statute that the magistrate or circuit court, or some court of record, is the proper authority to issue such warrants upon proper application submitted to said court.

The principal statute dealing with the issuance of such warrants, which relates solely to criminal offenses, is Section 542.260, RSMo 1949, which vests authority in any officer authorized to issue process for the apprehension of offenders when personal property has been stolen or embezzled, or complainant suspects the property is concealed someplace, if such magistrate shall be satisfied there is reasonable grounds for such suspicion. See also Section 542.380, RSMo Cum. Supp. 1953, which vests similar authority in any officer authorized to issue process for apprehension of offenders.

Section 542.020, RSMo 1949, does authorize mayors and police judges of certain incorporated cities and towns to issue process for the apprehension of persons charged with criminal offenses. However, it restricts such authority to the proceedings under Sections 542.020-140 for surety to keep the peace. Apparently such statute does not constitute authority conferring power upon such municipal court so as to classify them officers authorized to issue process for apprehension of offenders, thereby being those authorized to issue search warrants.

The rule is well stated in Volume 79, Corpus Juris Secundum, Sec. 72, p. 854, wherein it says, in part:

"* * * Municipal or police judges may not issue warrants when not properly authorized by statute; * * *"

Cornelius on Search and Seizure, 2nd Ed., Sec. 309, p. 609, reads, in part:

"May a search warrant be issued under the state or federal law for an alleged violation of such city ordinance?"

"Where, either by reason of constitutional provisions or the language of the statute, a search warrant can not issue unless there is probable cause to believe that a criminal

Honorable Cowgill Blair, Jr.

offense has been committed, it is held by the weight of authority that the violation of a city ordinance is not such an offense as will sustain the issuing of the warrant."

The courts of this state have uniformly held that a violation of a city ordinance is not a criminal offense within the meaning of the Constitution. Prosecution of the violation of a city ordinance is in the nature of a civil action. See Hoffman v. Graber, 153 S.W.2d 817, l.c. 819; Daggs v. St. Louis-San Francisco RR Co., 51 S.W.2d 164, l.c. 167; Meredith v. Willock, 158 S.W. 1061, l.c. 1063, 173 Mo.App. 542.

Section 5, Article V of the Constitution of Missouri 1945 vests in the Supreme Court of Missouri authority to establish rules of practice and procedure for all courts. Acting under such authority the Supreme Court adopted Rule 33, which provides that the judge or magistrate of any court having original jurisdiction to try criminal cases may issue search warrants under certain specified conditions. There is no provision in said rule providing for anyone else issuing search warrants. It is significant to notice that the Supreme Court in promulgating said rule did not include, as one having authority to issue such search warrants, municipal courts.

In view of the absence of some specific statutory authority for such municipal courts to issue search warrants, I believe that such courts cannot do so.

CONCLUSION

Therefore, it is the opinion of this department that a municipal court created under said charter is unauthorized to issue warrants for search and seizure as provided in Article IX, Section 9.01 of said charter, and therefore such provision is invalid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

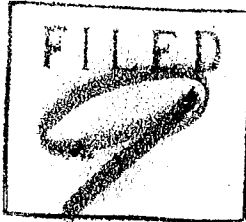
Yours very truly,

John M. Dalton
Attorney General

ARH/vtl

PROSECUTING ATTORNEYS:
CITY ORDINANCES:
ST. LOUIS COUNTY:

A prosecution by the Prosecuting Attorney of St. Louis County would not lie against an unlicensed electrician who made an installation in an incorporated city in St. Louis County.



April 4, 1955

Honorable John M. Blayney, Jr.
Assistant County Counselor
Law Department, Courthouse
Clayton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Would you be kind enough to give us your opinion as to the validity of a prosecution by the Prosecuting Attorney of St. Louis County under Section 64.170 - 64.200 R.S.No., 1949, under the following facts;

"St. Louis County Ordinance No. 472 (June 30, 1954) Section 10 provides that: 'The building official is hereby authorized to contract with and provide electrical inspections for incorporated cities, towns, and villages of St. Louis County, and to issue, collect for, and disburse receipts to such incorporated cities, towns, and villages, for electrical permits and inspections.'

"Under this section such a contract was entered into with the city of Clayton. Recently an unlicensed electrician made an installation in the above city which was condemned by the County.

"Would the mere fact that the man was unlicensed warrant a prosecution under the above mentioned State Statute?"

Honorable John M. Blayney, Jr.

In a subsequent letter to this department, in reference to the matter of your original inquiry, you wrote:

" * * * The problem arose when an unlicensed electrician did some electrical wiring in a building within the corporate limits of the City of Clayton. Under the provision of the County Ordinance which I quoted in my letter of January 10th, the County made an inspection of the work involved and found that it was not done according to the accepted standards for such work. Therefore the inspector for the County refused to approve the work and insisted that a licensed electrician correct the mistakes. The work has subsequently been approved by the County. However the question still remains as to the proper remedy to prevent unlicensed electricians from making electrical installations.

"While it is probably true that a prosecution would lie by the City of Clayton, the head of the Electrical Department in the County feels that a prosecution by the State would carry much more weight and would be effective to prevent such occurrences in the future.

"The Ordinance adopted by the County covers only the unincorporated areas except for the provision quoted in my previous letter, and in my opinion a prosecution under the facts stated above could not properly be brought by the County.

"The question at issue is whether or not a prosecution may be brought by the Prosecuting Attorney of St. Louis County under Section 64.170 - 64.200 of the State Statutes under the facts set forth above. In other words I am not interested in the quality of the work but simply in a prosecution for making an electrical installation without a license."

Honorable John M. Blayney, Jr.

We note your statement in your second letter that: "The ordinance adopted by the county covers only the unincorporated areas except for the provision quoted in my previous letter." The provision referred to is Section X of St. Louis County Ordinance No. 472. All that this provision does is to give "the building official" authority to contract with and provide electrical inspection for incorporated cities, towns, and villages in St. Louis County.

It is, of course, axiomatic that criminal laws are to be strictly construed, and with this in mind we are wholly unable to see any basis for a prosecution proceeding under the state of facts set forth by you.

CONCLUSION

It is the opinion of this department that a prosecution by the prosecuting attorney of St. Louis County would not lie against an unlicensed electrician who made an installation in an incorporated city in St. Louis County.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:vlw

COUNTY COURT: County Court may not incorporate a city, town or
MUNICIPALITIES: village, where proceedings have been instituted by
a City Council, to extend the city limits to encompass
the same area; a constitutional charter city is not
a city of the second class.



June 2, 1955

Honorable Cowgill Blair, Jr.
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this office, which request reads as follows:

"On May 7, 1955, the Council of the City of Joplin passed an ordinance between 11:00 and 11:30 a.m. calling a special election for August 9, 1955, for the voters to vote on an amendment to the Charter extending the boundaries of the City of Joplin, and the ordinance listed territory north, east and west of the City of Joplin. About one-half hour later residents of territory north and east of Joplin filed a petition to incorporate with the County Court at Carthage, asking for incorporation of territory adjacent to the City of Joplin and covering an area about three miles long by two miles wide, and asking that the County Court set a date for hearing, which has not yet been set by the Court. This territory is adjacent to and contiguous with the east city limits of the City of Joplin. The petition included more territory north and east of the City of Joplin than is covered by the ordinance and there was territory covered by the city ordinance. The petition to incorporate covered territory equivalent to about half the size of the City of Joplin and about 2,000 people allegedly reside in the area

Honorable Cowgill Blair, Jr.

covered by the petition. There are no incorporated villages or towns in the territory covered by either the petition or the ordinance. No other ordinance relative to the subject territory has been passed by the City Council and no other petitions or suits have been filed except those herein mentioned.

"The City has had under consideration the annexation of territory adjacent to Joplin and east thereof for some time and newspapers have carried articles over a period of months about proceedings before either the Council or the City Planning Commission. Petitions were being passed for an incorporation prior to the passage of the ordinance and there was publicity about the passage of such a petition. The counsel for the incorporation petitioners claims that the City acted at the last minute to defeat incorporation, that the ordinance is of doubtful legality because of descriptions and other points, that the ordinance was 'fraudulently passed' to frustrate the will of the people involved, and that the City is not a proper party to the incorporation proceedings and has no right to be heard in such proceedings.

"As above explained, the petition covers not only territory referred to in the ordinance, but also additional territory.

"Section 1.04 on Powers of the City under the Home Rule Charter passed February 9, 1954, gives the City all the powers of local government and home rule and all powers possible for any city to have under constitution and laws of the State of Missouri and all powers which the legislature would be competent to grant. Under Section 2.15, sub-paragraph 22, the City has power to extend limits by ordinance subject to the approval of the majority of the voters voting at any special election.

"The County Court is desirous of knowing, before proceeding with any hearing on this matter:

"1. Whether or not Section 72.130, R. S. Missouri, 1949, prohibiting organization of cities, towns or

Honorable Cowgill Blair, Jr.

villages adjacent or within two miles of the limits of any first or second class city, applies to the City of Joplin, a second class city until the adoption of a Home Rule Charter by election of February 9, 1954, on which date the City adopted a constitutional charter. Is Joplin still a second class city under Chapter 72 or is it entitled to the protection given by the above section?

"2. Does the 'prior jurisdiction' rule of the Supreme Court in the cases of State v. Smith, 53 S.W. 2d 271, and State v. North Kansas City, 228 S.W. 2d 762 that the County Court does not have jurisdiction or authority to incorporate a town or city so long as the annexation proceedings of the City Council covering the same territory were pending, apply here so as to oust the County Court of jurisdiction to proceed to hearing and determination of the question of incorporation on the petition of the residents of Duquesne?"

We understand the facts as stated to be as follows: On May 7, 1955, between the hours of 11:00 and 11:30 A. M., the City Council of Joplin, a constitutional charter city, passed an ordinance calling a special election for the purpose of amending the charter to annex to certain territory adjacent to the city. At a time subsequent to the passing of said ordinance, residents in an area adjacent to the City of Joplin filed a petition to incorporate with the County Court. The petition to incorporate included territory not covered by the ordinance, and the ordinance included territory not included in the petition filed with the County Court. However, a portion of the area was common both to the petition and to the ordinance. Other facts stated will be referred to herein as deemed necessary.

The questions which you have proposed will be treated in inverse order. You inquire whether the "prior jurisdiction" rule, as stated by the Supreme Court of Missouri in the case of State v. Smith, reported in 53 SW2d 271, and in the case of State v. North Kansas City, reported in 228 SW2d 762, applies to the facts stated so as to oust the County Court of jurisdiction to act upon the petition for incorporation filed with said body.

The "prior jurisdiction" rule is simply and concisely stated in 43 C. J., p. 83, Section 23:

Honorable Cowgill Blair, Jr.

"Also, where under different statutes, vesting jurisdiction in different persons or authorities, the same territory is subject either to formation into a new municipality or to annexation to an existing municipality, the jurisdiction first invoked becomes exclusive."

This rule has been adopted and applied by the Supreme Court of Missouri as the law of this state in the cases above noted. Let us first consider briefly the case of State v. Smith, 53 SW2d 271, since it bears a marked similarity to the instant facts. In that case, an ordinance was duly presented to the City Council of Louisiana, proposing to extend the city limits, on May 3, 1929. The ordinance was tabled for 30 days to permit property owners of the area involved to protest the passing of the ordinance. On May 13, 1929, the residents of the area presented a petition to the County Court asking for the incorporation of the territory as a village, and the County Court, on the same day, entered its order of incorporation. The ordinance for the extension of the city limits was not finally passed until May 14, 1929. The Supreme Court, after reviewing several cases from other jurisdictions, stated:

"The question arises which of the proceedings instituted in this case takes precedence of the other. It is a well-established principle of law that, when several separate authorities have concurrent jurisdiction of the same subject-matter, the one in which proceedings were first commenced has exclusive jurisdiction to the end of the controversy.* * *

* * * * *

"* * * In the case now before us an ordinance, extending the city limits of the city of Louisiana, was presented to the city council by the ordinance committee on May 3, 1929. The inhabitants of the territory, proposed to be taken in under the ordinance, through their attorney, presented a petition of protest and asked thirty days further time in which to be heard. The city council granted the request. The ordinance was read and ordered published. Final action was postponed for thirty days. The inhabitants of the territory, through their attorneys, having lulled the city authorities into inaction, proceeded to obtain their purpose and to

Honorable Cowgill Blair, Jr.

defeat the action of the city council by instituting proceedings before the county court and obtaining an order of incorporation the same day the petition was filed with the county court. Such a course of procedure should not receive the sanction of a court of justice. As illustrated by the cases cited above, it is evident that the county court of Pike county did not have jurisdiction or authority to incorporate the town of Elmwood so long as the annexation proceedings of the city council covering the same territory were pending. The order of the county court incorporating the territory as a village was void."

The import of the cases reviewed by the court is to the effect that the legislature did not intend to give one governmental body the power to annex or incorporate a given area and, at the same time, authorize another governmental body to defeat such right by a subsequent proceeding; that it would be an anomalous situation if coordinate bodies exercising governmental power could operate upon the same subject-matter at one and the same time and thus enter upon a race to accomplish the objects of the proceedings.

The doctrine of prior jurisdiction, as above noted and as applied in the Smith case, was reaffirmed by the Supreme Court in the case of State v. North Kansas City, 228 SW2d 762. In the latter case, the city of Kansas City, Missouri (a constitutional charter city), and the city of North Kansas City (a city of the fourth class) were attempting to annex identical territory. An ordinance was introduced in the city of Kansas City Council on August 19, 1946, and an ordinance was introduced in the Board of Aldermen of North Kansas City on August 20, 1946. In the course of its opinion, the court said:

"Under the instant circumstances, the well established doctrine of 'prior jurisdiction' must be applied. We so held (and applied it) in State ex inf. Goodman ex rel. Crewdson v. Smith, 331 Mo. 211, 53 S.W.2d 271, 272. In that case there was introduced in the Council of the City of Louisiana, on May 3, 1929, a proposed ordinance to extend its limits to include a certain area contiguous to that city. On May 13, 1929, the inhabitants of that area presented a proper petition, and on that day the county court made an order incorporating Louisiana's proposed annexation area

Honorable Cowgill Blair, Jr.

as the village of Elmwood. The proposed ordinance of Louisiana was not passed until May 14, 1929. Upon the appeal of a quo warranto proceeding filed by Louisiana to test the validity of Elmwood's incorporation, we held that 'when several separate authorities have concurrent jurisdiction of the same subject-matter, the one in which proceedings were first commenced has exclusive jurisdiction to the end of the controversy.' We there sustained the right of Louisiana to carry its first instituted annexation proceedings through to a conclusion. The impact of that principle cannot be escaped here. A situation identical with the instant one was before the Texas Supreme Court in *City of Houston v. State*, supra. In that case the City of Houston and the City of West University Place each sought to annex the identical territory which was contiguous to each of those cities. The doctrine of 'prior jurisdiction' was there recognized. Under the circumstances which obtain in this case the doctrine is universally recognized and applied. See also, *Popenfus v. City of Milwaukee*, 208 Wis. 431, 243 N.W. 315; *State ex rel. Johnson v. Clark*, 21 N.D. 517, 131 N.W. 715; *People ex rel. City of Pasadena v. City of Monterey Park*, 40 Cal.App. 715, 181 P. 825; *McQuillin Municipal Corporations*, 2nd Ed. Vol. 1, p. 476; 43 C.J. *Municipal Corporations*, p. 83; 62 C.J.S., *Municipal Corporations*, Sec. 9.

"Inasmuch as relator's charter amendment extending its city limits northward into Clay County, Missouri, was legally passed by its City Council and approved by its mayor; and inasmuch as said charter amendment was thereafter legally adopted and approved by relator's electors, all as required by the Constitution; and inasmuch as it is conceded that the proceedings to so amend its charter as to extend relator's city limits northward into Clay County were instituted and begun prior to the time respondent instituted its proceedings to extend its limits and thereby annex a portion of the area relator proposed to annex, we cannot escape the ruling that (1) relator, by the institution of its prior proceedings on August 19, 1946 thereby acquired prior jurisdiction of

Honorable Cowgill Blair, Jr.

the subject matter, and (2) relator thereby acquired the right to continue its proceedings to a conclusion, unimpaired by any effort whatever upon the part of respondent to annex any of the same area."

In view of the foregoing authorities we must and do hold, assuming of course no irregularities in the proceeding before the City Council, that when the ordinance providing for the submission to the electors of the City of Joplin of a proposal to amend the charter to extend its corporate limits was duly presented to the Council and passed prior to the filing of a petition with the County Court for the incorporation of common area, the city obtained jurisdiction of the proceeding and acquired the right to continue its proceeding to conclusion and to the exclusion of the County Court.

In other words, we are of the opinion that the County Court does not have authority to act upon the petition for incorporation pending termination of the proceedings by the city.

You further inquire whether the city of Joplin, having adopted a charter form of government at its election held February 9, 1954, is also a city of the second class and thereby subject to the provisions of Section 72.130 RSMo 1949, relating to cities of the second class. Section 72.130 prohibits the organization of a city, town or village adjacent to or within two miles of the city limits of any city of the first or second class unless such city, town or village is in a different county. Such section more fully provides as follows:

"No city, town or village shall be organized within this state under and by virtue of any law thereof, adjacent to or within two miles of the limits of any city of the first or second class, unless such city, town or village be in a different county from such city."

It is our opinion that the above section would not prohibit the organization of a city, town or village adjacent or within two miles of the city limits of the city of Joplin since the city of Joplin is a constitutional charter city. It is to be noted that the prohibition contained in said section applies only where a city of the first or second class is involved. In view of the fact that Joplin is a constitutional charter city, it could not, we believe, be a city of the second class and, therefore, is not subject to the restrictions or entitled to the benefits of laws relating to cities of the second class. In

Honorable Cowgill Blair, Jr.

this regard see the case of Elting v. Hickman, 172 Mo. 237, wherein the court said, l.c. 255, 256:

8529
7615
6095
6217.090
72.080
.090
1.00

"* * *It thus seems that although a city organized under a special charter may have the requisite number of inhabitants to become a city of the third class, it does not ipso facto become such, but that in order to do so it must proceed in accordance with section 5257, Revised Statutes of 1899. * * *

"By the Constitution the Legislature was required to provide for four classes of cities, and to give to each city of a given class, the same powers, and to subject each class to the same restrictions, but cities of the third class having special charters are not included in this classification unless they elect to become so, as before indicated. It is therefore plain that cities which retain their special charters do not belong to either of the classes provided for by the Constitution, although they may have the requisite number of inhabitants to become such, unless they first elect to do so." (Underscoring ours.)

See also State v. City of St. Louis, 2 SW2d 713.

CONCLUSION

Therefore, it is the opinion of this office that:

A County Court does not have the authority to incorporate a given area as a city, town or village where an ordinance has been introduced into the Council of a constitutional charter city providing for the submission to the electors of such city of a proposal to amend the charter to extend its corporate limits, including the same area.

It is the further opinion of this office that a constitutional charter city is not, insofar as laws relating thereto are concerned, a city of the second class, although such city may have the requisite number of inhabitants to become such.

Honorable Cowgill Blair, Jr.

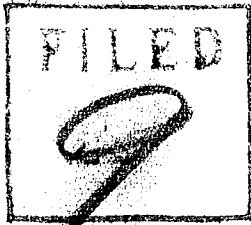
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:sm

PUBLIC OFFICERS--deputy : Section 8 of Article VII of the Constitu-
county assessors: : tion of 1945 of this State prohibits the
: election or appointment of non-residents
: to public office in this State.
.....



June 27, 1955

Honorable Cowgill Blair, Jr.
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Mr. Blair:

This will be the opinion you requested from this office, at the instance of the Presiding Judge of the County Court of Jasper County, Missouri, and a like request from you asking for an opinion respecting two questions submitted for consideration. The request of the Presiding Judge of said county and your request, respectively, read as follow:

"The State Tax Commission has ordered, or rather has notified us that they will order about July 1, a raise in assessed valuation for Jasper County of 85% on urban properties and 60% on rural. We have decided that, due to shortness of time and the large amount of work involved, the only way we can comply with this order this year is to put on a blanket raise of that amount.

"However, we want to hire an outside firm and make a scientific reappraisal of all property later this year so we can have a new and accurate appraisal ready for next year. This will cost the county between \$60,000 and \$70,000. There is no such amount set up in the budget for this purpose.

"We do have an item of \$15,000 set up in the emergency fund. Also we anticipate that we will have a cash carryover of about \$25,000.

Honorable Cowgill Blair, Jr.:

"We understand that these outside appraisers will have to be deputy assessors, and will have to be paid through the assessor's office.

"Question No. 1: 'Does the County Court have the authority to transfer any available money after Nov. 1 to the assessor's account to be spent for this purpose?'

"Our budget was set up on the basis of 45 cents levy on about \$72 million valuation. This was a tentative levy, however, and the levy will not be officially set until after the board of appeals in August. At that time, having complied with the order of the Tax Commission, we will have a valuation of over \$100 million. In order to yield the same amount of money as previously budgeted, we will need a levy of only about 33 cents.

"Question No. 2: 'Can the County Court set this levy at enough higher rate than 33 cents to take care of the added expense of re-appraisal?'"

* * * * *

"Enclosed is a copy of a letter from the Presiding Judge of the Jasper County Court which is self-explanatory.

"I would appreciate answers to Questions 1 and 2 and also would appreciate your opinion as to whether or not the County Court is authorized to spend \$60,000 to \$70,000 to employ a Chicago appraising firm to do this work.

"I would appreciate your opinion on these matters as soon as possible."

The request submits two questions by the Presiding Judge of the County Court of Jasper County, Missouri, and

Honorable Cowgill Blair, Jr.:

a supplemental question by the Prosecuting Attorney of that county.

The questions are all based upon the express statement in the request that persons of another state who are non-residents of Missouri are to be employed, apparently by the County Court of Jasper County, to make a reappraisal of all property in that county, and that such non-resident persons will have to be appointed deputy county assessors of Jasper County, and will have to be paid through the assessor's office of that county. That plan being the procedure proposed to be followed under the presupposed right of the County Court to employ such non-residents, and for such persons to be appointed deputy assessors of Jasper County who are to be so compensated for such reappraisal, render it unnecessary to answer Questions Nos. 1 and 2.

Appointment by the county assessor of Jasper County, Missouri, of citizens who are non-residents of this State as deputy county assessors to make a reappraisal or reassessment of property in that county is prohibited by the Constitution of Missouri. The appointment of such non-residents to office as deputy county assessors of said county would give none of them any title or right to such offices.

Section 8 of Article VII of the Constitution of Missouri, prescribing qualifications for public office, and forbidding the election or appointment of non-residents to public office in this State, reads as follows:

"Qualifications for Public Office--Non-residents.--No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

County assessors and deputy county assessors in this State are public officers. The performance of their duties in making assessments involves the exercise of discretionary judgment as an element of sovereign power in fixing values of property. There is nothing ministerial or administrative in the duties they must perform in making assessments of

Honorable Cowgill Blair, Jr.:

property.

The respective official oaths required to be taken by the assessor under Section 53.030 and by deputy assessors under Section 53.060 impose upon each of them duties requiring the exercise of discretion in fixing the value of property in completing an assessment. Our Supreme Court in the case of Wymore et al. vs. Markway, 338 Mo. Rep. 46, 89 S.W.(2d) 9, l.c. 13, on this subject said:

"* * * The principle is firmly established that in making assessment he acts in a judicial capacity. State ex rel. Wyatt v. Hoyt, 123 Mo. 348, 27 S.W. 382."

Section 53.030, prescribing the oath of office to be taken by a county assessor, reads as follows:

"Every assessor shall take an oath or affirmation to support the Constitution of the United States and of this state, and to demean himself faithfully in office and to assess all of the real and tangible personal property in the county in which he assesses at what he believes to be the actual cash value. He shall endorse this oath on his certificate of election or appointment before entering upon the duties of his office."

Section 53.040 prescribes that every assessor (except in the City of St. Louis) shall give a faithful performance of duties bond.

Section 53.060 provides that every assessor, except in the City of St. Louis, may appoint such deputies as needed and that each shall take the same oath and have like power as the assessor. Said section, so providing, reads as follows:

"Every assessor, except in the city of St. Louis, may appoint as many deputies as he may need, to be paid as provided by

Honorable Cowgill Blair, Jr.:

law. Each deputy shall take the same oath and have the same power and authority as the assessor himself. The assessor shall be responsible for the official acts of his deputies."

The question of the duties to be performed and other criteria bearing upon the question of who is a public officer is discussed and decided in the case of State ex rel. vs. Bus, 135 Mo. 325, 1.c. 331, 332, where the Court said:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' Mechem, Pub. Offices, 1. The individual who is invested with the authority and is required to perform the duties is a public officer.

"The courts have undertaken to give definitions in many cases, and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law and discharges some of the functions of government he will be a public officer. * * *."

Section 10 of Article VIII of the Missouri Constitution of 1875, now Section 8 of Article VII of our present Constitution, as applied to Section 40(a), Article IV of the present Constitution on the same precise question was construed by the Supreme Court of Missouri in State inf. McKittrick vs. Bode, 342 Mo. Rep. 162, 113 S.W. (2d) 805, 1.c. 806, 807, where the Court said:

"It is not possible to define the words 'public office or public officer.' The cases are determined from the particular

Honorable Cowgill Blair, Jr.:

facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, and to be attained, depository of the power granted, and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all the cases. For instance, tenure, oath, bond, official designation, compensation, and dignity of position may be considered. However, they are not conclusive. It should be noted that the courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered. The question is considered at length in 46 C.J. p. 924. In determining that a deputy sheriff was a public officer, we stated the rule as follows:

"A public office is defined to be "the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." Mechem, Pub. Off., 1. The individual who is invested with the authority, and is required to perform the duties, is a public officer.

"The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer.

* * * "

Honorable Cowgill Blair, Jr.:

The ultimate holding in the Bode case, supra, where the Court quoted from the Bus case, supra, is that one is made a public officer who receives his authority from the State and discharges some of the functions of government in the performance of his official duties.

The rule approved by the Court in the Bus case and restated in the Bode case is applicable here to the effect that under both the facts and the law the county assessor of Jasper County, Missouri, and his deputies are public officers. The county assessor of Jasper County and his deputies so being public officers, the terms of Section 8 of Article VII, supra, of the Constitution of Missouri prohibit the appointment of non-residents of Missouri as deputy assessors of that county in this State for the purpose of making a reappraisal or re-assessment of property in said county. It follows, therefore, that the County Court of Jasper County is not authorized to spend \$60,000 to \$70,000 or any amount whatever of public funds to employ non-resident persons who will be appointed deputy county assessors of Jasper County, to make a reappraisal or re-assessment of property in said county.

CONCLUSION

Considering the premises it is the opinion of this office that the County Court of Jasper County is not authorized to spend \$60,000 to \$70,000 or any amount whatever of public funds to employ persons who are non-residents of this State who will be appointed deputy county assessors of Jasper County to make a reappraisal or re-assessment of property in said county, because the election or appointment to public office in this State of non-residents is prohibited by the terms of Section 8 of Article VII of the Constitution of Missouri, 1945.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

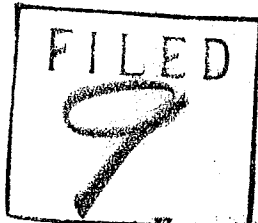
Yours very truly,

JOHN M. DALTON
Attorney General

GWC:irk

COURT REPORTERS:
SALARIES:
CIRCUIT COURT REPORTERS:
APPROPRIATIONS:
OFFICIAL COURT REPORTERS:

S.C.S.H.B. #384 of the 68th General Assembly requires the state to pay one-fourth of the salary of a court reporter, and in the absence of both an appropriation by the Legislature for this purpose and a statutory requirement that the state reimburse counties which pay the total salary, a court reporter will receive only three-fourths of his salary.



September 8, 1955

Honorable Cowgill Blair, Jr.
Prosecuting Attorney
Jasper County
Joplin, Missouri

Attention: Mr. R. A. Esterly

Dear Sir:

This is in response to your request for an official opinion of this office, which request reads as follows:

"Carl Sanders, County Clerk of Jasper County, after conferring with and at the suggestion of Newton Atterbury, State Comptroller, has raised a question with reference to Senate Committee Substitute for House Bill #384 which I understand is to become effective August 29th, and provides for a \$1,000 salary raise to court reporters in the Circuit Courts of this state, $\frac{3}{4}$ of which is to be paid by the County and $\frac{1}{4}$ by the State.

"Mr. Sanders states that no money was appropriated by the State for paying its portion of this salary. Mr. Sanders, therefore, raises the question as to whether or not it becomes incumbent upon the County to pay the State's portion of this salary raise, or is the effect of this just to give the court reporters a raise equivalent to $\frac{3}{4}$ of \$1,000 per year? In other words, just what are the duties of the County Clerk with reference to salary to be paid to court reporters under this new law?"

Since no money was appropriated by the Legislature for the salaries of court reporters, it is clear that the State Comptroller is not able to carry out S.C.S.H.B. #384. See Article IV,

Honorable Cowgill Blair, Jr.

Section 28, Constitution of Missouri, 1945, which reads as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay. * * *"

Section 33.170, RSMo 1949, in accordance with the Constitution, provides:

"No claim or account shall be preapproved by the comptroller, nor shall any warrant be paid by the state treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

The issue becomes then whether the Legislature in passing S.C.S.H.B. #384, intended to have the counties pay the entire salary and for the state to reimburse them for one-fourth of such expense.

Section 485.060, of House Bill 384, as perfected, stated in part:

"1. Court reporter shall receive salary as follows:

"(1) In judicial circuits which now have and such as may hereafter have a population of sixty thousand or more, an annual salary of six thousand dollars, payable in equal monthly installments out of the state treasury on the certification of the judge of the court in whose division such court reporter is employed." (Emphasis supplied.)

and Section 485.065, stated, in part, as follows:

Honorable Cowgill Blair, Jr.

"Court reporters are hereby declared to be state employees and shall hereafter be considered as such. All salaries, fees and other compensations due court reporters shall hereafter be paid out of the state treasury and all fees earned and collected by the clerk of any court for the services of court reporters shall be paid into the state treasury to the credit of the general revenue fund.* * *"

This proposed section was, of course, a substantial revision of Section 485.060, RSMo Cumulative Supplement, 1953, which nowhere made court reporters "state employees" and further provided that:

"(1) In judicial circuits which now have and such as may hereafter have a population of sixty thousand or more, an annual salary of five thousand dollars, payable in equal monthly installments out of the city or county treasury on the certification of the judge of the court in whose division such court reporter is employed; * * *" (Emphasis supplied.)

S.C.S.H.B. #384, (Truly Agreed to and Finally Passed), striking out this radical change of House Bill #384, provides:

"485.060. The court reporter for a circuit or common pleas court shall receive an annual salary of six thousand dollars, payable in equal monthly installments on the certification of the judge of the court or division in whose court the reporter is employed."

"485.065. Three fourths of the salary of the court reporter shall be paid out of the county treasury and one-fourth out of the state treasury. Where a judicial circuit is composed of more than one county, the county part of the salary shall be divided among the counties and be paid by them proportionately as the population of such county bears to the entire population of the circuit."

The Legislature, in the final version of House Bill 384, expressly repudiated the provision making court reporters state employees and required that only one-fourth of the salary allowed

Honorable Cowgill Blair, Jr.

court reporters be paid by the state. Therefore, either the court reporters are to consider themselves as partly state employees in regard to salaries, or remain in their status of county employee. Although the Legislature did not clearly change the latter status to the former in S.C.S.H.B. #384, it did intend to move towards making court reporters dependent on the state for salary and expenses. As an indication of this legislative intent, Section 485.090 of S.C.S.H.B. #384 should be noted:

"Every official court reporter of a circuit court of a judicial circuit comprised of two or more counties, in addition to his salary, shall be reimbursed for all sums of money actually expended by him in necessary hotel and traveling expenses while engaged in attending any regular, special or adjourned term of court at any place in the judicial circuit in which he is appointed, other than the county of his residence, or while engaged in going to and from any such place for the purpose of attending terms of court. Three-fourths of the actual expenses of the official court reporter, as herein provided, shall be paid out of the county treasury and one-fourth out of the state treasury. Where a judicial circuit is composed of more than one county, the county part of the expense shall be divided among the counties in the manner provided in Section 485.065; provided however that the actual expenses of the official court reporter upon transfer from the judicial circuit to which assigned shall be paid out of the state treasury." (Emphasis supplied.)

This section should be compared with earlier Section 485.090, RSMo Cumulative Supplement 1953:

"Every official court reporter of a circuit or criminal court of a judicial circuit comprised of two or more counties shall be allowed and paid all sums of money actually expended only in necessary hotel and traveling expenses, while engaged in attending any regular, special or adjourned term of court at any place in the

Honorable Cowgill Blair, Jr.

judicial circuit in which he is appointed, other than the county of his residence, or while engaged in going to and from any such place for the purpose of attending such terms of court. Such moneys shall be paid out of the county treasuries of the respective counties in said judicial circuit in proportion to their respective population." (Emphasis supplied.)

Furthermore, one need not even speculate as to legislative intent when the words of the statute are so plain and unambiguous as in Section 485.065:

"Three-fourths of the salary of the court reporter shall be paid out of the county treasury and one fourth out of the state treasury. * * *"

A somewhat analagous situation was discussed in the attached opinion written to the Honorable J. Marcus Kirtley, County Counselor of Jackson County on July 27, 1955, in which Section 111.405, RSMo Cumulative Supplement, 1953, was discussed. Section 111.405, requires that the state reimburse a county for its election expenses when only statewide issues appear on a ballot. This section provides expressly, however, for such a reimbursement. Nothing in S.C.S.H.B. #384 requires the state to reimburse a county which has paid all of a court reporter's salary.

In the absence then of both an express requirement for state reimbursement of counties which pay the entire salary and an appropriation by the legislature to pay the state's share of the salary, court reporters are necessarily denied one-fourth of the salary allowed under S.C.S.H.B. #384.

CONCLUSION

It is, therefore, the opinion of this office that S.C.S.H.B. #384 of the 68th General Assembly requires the state to pay one-fourth of the salary of a court reporter, and in the absence of both an appropriation by the Legislature for this purpose and a statutory requirement that the state reimburse counties which pay the total salary, a court reporter will receive only three-fourths of his salary.

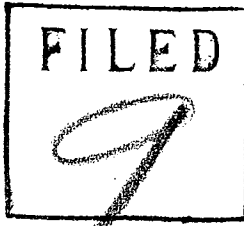
Very truly yours,

John M. Dalton
Attorney General

Enclosure - J. Marcus Kirtley
7-27-55

WLaB:ld, vlw

SHERIFFS: The term "deputy sheriffs" as used in Senate Bill 214,
JAILERS: does not include persons employed under the provisions
of Sec. 57.240, to attend the jail in counties of the
second class.



November 18, 1955

Honorable Cowgill Blair, Jr.
Prosecuting Attorney
Joplin, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this office, which request reads as follows:

"Recently there was passed by the Legislature
and approved by the Governor, Senate Bill No.
214 under which the deputy sheriffs of the
respective counties were authorized to have
a number of deputies based on one deputy
for each 4,000 population in the particular
county.

"In Jasper County the inquiry arises as to,
for the purpose of compliance with this law,
jailers whose duties are restricted to
handling matters connected with the county
jail and who do not go out and do criminal
or civil work and whether these jailers are
to be classified under this new law as
deputies. This inquiry is particularly
important because we are after the first of
the year going to have a new modern jail
in our county, which will, of course,
require additional personnel. If jailers
are to be classified as deputy sheriffs and
a substantially increased number of jailers
is required, of course the efficacy of
this law will be substantially impaired,
as far as our county is concerned.

"Please check into this matter and give us an
opinion at the earliest possible date. * * *"

Hon. Cowgill Blair, Jr.

Senate Bill No. 214, enacted by the Sixty-eighth General Assembly, to which you refer, provides as follows:

"Section 1. Section 57.220, RSMo 1949, is repealed and one new section enacted in lieu thereof to be known as Section 57.220, to read as follows:

"57.220. The sheriff, in a county of the second class, shall be entitled to such a number of deputies as the judges of the circuit court shall deem necessary for the prompt and proper discharge of the duties of his office, provided however, such number of deputies appointed by the sheriff shall not be less than one chief deputy sheriff and one additional deputy for each five thousand inhabitants of the county according to the last decennial census. Such deputies shall be appointed by the sheriff, but no appointment shall become effective until approved by the judges of the circuit court of the county. The judges of the circuit court, by agreement with the sheriff, shall fix the salaries of such deputies. A statement of the number of deputies allowed the sheriff, and their compensation, together with the approval of any appointment by the judges of the circuit court shall be in writing and signed by them and filed by the sheriff with the county court."

We wish to note that said bill does not purport to place a maximum on the number of deputy sheriffs in counties of the second class, but instead fixes a minimum on the number of deputy sheriffs that shall be appointed. Above such minimum, the sheriff would be entitled to appoint such other deputies as the judges of the circuit court should deem necessary for the prompt and proper discharge of the duties of the office.

You inquire whether the term "deputies," as used in said Senate Bill 214 includes jailers.

It is a familiar rule of statutory construction that statutes relating to the same subject must be read and construed together so as to work out and accomplish the central idea of the Legislature.

Hon. Cowgill Blair, Jr.

In this regard your attention is directed to Section 57.240, which provides as follows:

"The sheriff in counties of the second class, may employ, in addition to the deputies authorized, such other employees, with the approval of the county court, as may be necessary to the efficient operation of his office and the performance of the duties imposed upon him by law. The salary of any person, so employed, shall be fixed by the sheriff, with the approval of the county court."

This section recognizes employees of the sheriff other than deputies and provides that the sheriff may employ such other employees with the approval of the county court as may be necessary to the efficient operation of the office and the performance of the duties enjoined upon said official. Such section would, we believe, embrace personnel employed to attend the jail.

In view of the foregoing, we are of the opinion that persons employed by the sheriff under the provisions of Section 57.240, RS Mo 1949 would not be considered as deputy sheriffs under the provisions of Senate Bill 214 enacted by the 68th General Assembly.

CONCLUSION

Therefore, it is the opinion of this office that persons employed by the sheriff of a county of the second class to attend the jail are not to be considered as deputy sheriffs under the provisions of Senate Bill 214 enacted by the Sixty-eighth General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:l c:mw

LOTTERIES: : The scheme herein described is a lottery;
GAMBLING: : while a Prosecuting Attorney has broad
PROSECUTING ATTORNEY:: discretion in determining whether a
: particular criminal case should be prose-
: cuted, a refusal to prosecute lottery
: cases generally, would constitute an abuse
: of his discretion.
.....



March 1, 1955

Honorable Paul Boone
Prosecuting Attorney
Ozark County
Gainesville, Missouri

Dear Mr. Boone:

Your letter of February 21, 1955, requesting
an opinion of this office, reads:

"The enclosed newspaper advertisement
has been running in the West Plains
Daily Quill, West Plains, Missouri,
over a period of several weeks, the
only change each week being in the
name of the winner for the previous
week.

"I have today been contacted by a
Service Station operator in my county
concerning the advertisement and ask-
ing my opinion as to whether or not
the project is a violation of the laws
of Missouri.

"It is my opinion that such a drawing
is a violation of the Lottery laws of
Missouri, however my inquirer takes
the opposite view of the law and cites
me to the enclosed clipping, and also
states that such an advertisement is
appearing in other counties in the
State.

"I would appreciate your opinion as to
whether or not the scheme described in
the advertisement is in violation of
the laws of Missouri.

"I would also appreciate your opinion
as to whether or not a Prosecuting At-
torney has any discretion in the en-
forcement of law violations concerning

Honorable Paul Boone:

drawings or lotteries. This question is being asked for the reason that numerous drawings, selling of chances and lotteries in different forms are being conducted in counties over the State, and the people in my county feel that the law should either be enforced or repealed."

The advertisement to which you refer, is as follows:

"FREE!

FREE!

BE A WINNER

WINNER SATURDAY - MRS. JOHN LAND, 914 W. 1st St. - 4.2 GAL.

NEW DRAWING EACH WEEK

Each time you purchase gasoline at the Renfro Phillips 66 Service Station at 218 E. Main, you will be given a ticket for the amount purchased. Each Saturday night a ticket will be drawn. The winner, whose name will appear in the Quill each Monday, will receive free, an equal of the amount shown on the ticket. Every purchase means another chance to win. The more you buy the more you can win.

BUY THE BEST WIN THE BEST

RENFRO PHILLIPS 66 SERVICE STATION".

The fundamental policy of the State toward lotteries is established by Article III, Section 39, Constitution of Missouri, 1945. That section provides, in part, as follows:

"* * * The general assembly shall not have power:

* * * * *

"(9) Authorization of Lotteries or Gift Enterprises.--To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; ".

It is made criminal by Section 563.430, RSMo 1949, to conduct a lottery in Missouri. That section provides:

Honorable Paul Boone:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

The Supreme Court of Missouri has declared in *State ex inf. McKittrick vs. Globe-Democrat Pub. Co.*, 341 Mo. 862, 110 S.W. (2d) 705, 713, that:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. * * *."

The "consideration" is the participation requirement that one must purchase gasoline from the person(s) conducting the scheme. It matters not that the price of the gasoline is no greater than it was prior to the institution of the scheme. The consideration in this scheme is similar to the consideration involved in the case of *State vs. Mumford*, 73 Mo. 647, 39 Am. Rep. 532. There, the subscriber to a newspaper received both the newspaper and a ticket which might draw a prize, for the regular subscription price of the newspaper. The Supreme Court of Missouri made the following statement, 1.c. 651:

"* * * The fact that the subscription price of the Times was not increased, does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a

Honorable Paul Boone:

ticket in the lottery as well as to a copy of the paper, * * *."

The gasoline which the winner receives is a "prize" as defined by 54 C.J.S., Lotteries, pages 849, 850:

"While a scheme or transaction cannot constitute a lottery unless it involves the offering of a prize, it is not essential that the prize, if a money one, be a specific amount, or that the prize be money or have a fixed market value, or that the value be previously fixed. In the absence of statute, anything of value offered as an inducement to participate in a scheme of chance is a prize. * * *."

The scheme at hand appears to be a conventional drawing, i.e., the winner is determined by the drawing of a ticket; and thus satisfies the "chance" requirement. State vs. McEwan, 120 S.W. (2d) 1098.

Since the scheme consists of the allocation of a thing of value, by chance, for a consideration, it constitutes a lottery.

We turn to your second question of whether a Prosecuting Attorney has any discretion in the enforcement of criminal laws concerning drawings or lotteries.

The Prosecuting Attorney does have a large degree of discretion in determining whether a particular criminal case should be instituted or pursued. See the comprehensive discussion of the breadth of the discretion of the Prosecuting Attorney, in the case of State ex rel. Griffin vs. Smith, 258 S.W. (2d) 590. Briefly, the Prosecuting Attorney may use his sound discretion, in good faith, in deciding whether to prosecute a particular case.

We gather, however, that your question does not pertain to any particular case, but instead inquires whether a Prosecuting Attorney may decline to prosecute lottery cases, generally, because lotteries may be operating in other counties without apparent interference by law enforcement officers. We cannot usurp the exercise

Honorable Paul Boone:

of discretion by Prosecuting Attorneys, but it is clear to us that a refusal to prosecute lottery cases, merely because of the prevalence of lotteries or the acceptance of them by a substantial portion of the people of a locality, would constitute not merely an abuse of discretion by the Prosecuting Attorney, but would be a refusal to exercise discretion at all. In the case of State vs. Wymore, 345 Mo. 169, 132 S.W. (2d) 979, it was plainly shown that the failure of a Prosecuting Attorney to suppress gambling could not be sanctioned under the guise of "discretion". Your attention is further invited to State ex inf. McKittrick vs. Graves, 346 Mo. 990, 144 S.W. (2d) 91, and State ex inf. McKittrick vs. Wallach, Mo., 182 S.W. (2d) 313.

CONCLUSION.

It is, therefore, the opinion of this office that the scheme hereinabove described is a lottery; and, that while a Prosecuting Attorney has broad discretion in determining whether a particular criminal case should be prosecuted, a refusal to prosecute lottery cases generally, would constitute an abuse of his discretion.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

: Neither insertion of lenses into spectacle frames,
OPTOMETRY: : nor the adjustment of such frames to the wearer's
EYEGLASSES: : face which does not affect or change the measure-
SPECTACLES: : ments upon which the original prescription is based,
: are required to be done by registered optometrists.
.....



April 18, 1955

Honorable J. R. Bockhorst, O.D.
Secretary-Treasurer
Missouri State Board of Optometry
359 Paul Brown Building
St. Louis 1, Missouri

Dear Dr. Bockhorst:

You have requested an opinion of this office on the following:

"Hearing aid manufacturers are now engaged in the manufacture of hearing aids made in the form of optical frames. The working components of the hearing aid are concealed in the temples of the frames.

"In order for the purchaser to obtain the proper benefits from the use of the hearing aid which is built into the optical frames, some fitting of these frames will have to be done in relation to the hearing and the purchaser's ear. Otherwise optimum results may not be obtained from the hearing aid.

"These hearing aid optical frames shall contain corrective lenses in some instances.

"Hearing aids are sold through hearing aid distributors who are not familiar with and who are not licensed in the fitting of eye glasses. The question presents itself as to whether or not in your State the laws provide that any part of spectacle frames containing corrective lenses may be fitted only by persons licensed by the State to do this work.

Honorable J. R. Bockhorst, O.D.:

"We need this information to establish a point of procedure. 1. The hearing aid dealer will have the optical frames in his possession of which the hearing aid is a part. May the hearing aid retailer insert the customers' lenses into the frames and fit the temples to the wearer?

"2. Must the optical frames from the hearing aid dealer be sent to a licensed optical operator and there have the lenses installed in the frames? May the hearing aid retailer then adjust the temples of the optical frames so that the purchaser gets the proper fitting and use of the hearing aid?

"3. May the hearing aid dealer re-adjust the temples of the optical frames in order to complete the hearing aid fitting after they have been previously adjusted by a licensed optical operator."

According to our interpretation of your letter, you wish answers to the following questions: (1) May persons not registered optometrists insert lenses into spectacles frames, and (2) May such persons adjust the frames to the face.

It is made unlawful by Section 336.020, RSMo 1949, for persons not registered optometrists to engage in the practice of optometry as defined by Section 336.010, RSMo 1949. The latter section provides:

"Any one of any combination of the following practices constitutes the practice of optometry:

"(1) The examination of the human eye, without the use of drugs, medicines or surgery, to ascertain the presence of defects or abnormal conditions which can be corrected by the use of lenses, prisms or ocular exercises.

"(2) The employment of objective or subjective mechanical means to determine the accommodative or refractive states of the human eye or the range of power of vision of the human eye.

"(3) The prescription or adaptation without the use of drugs, medicines or surgery,

Honorable J. R. Bockhorst, O.D.:

of lenses, prisms, or ocular exercises to correct defects or abnormal conditions of the human eye or to adjust the human eye to the conditions of special occupations. No registered apprentice may independently practice optometry. A registered apprentice may, however, under the immediate personal supervision of a registered optometrist, assist a registered optometrist in the practice of optometry.

Certain exemptions from the provisions of Chapter 336 are made by Section 336.120, RSMo 1949. That section provides:

"The following persons, firms and corporations are exempt from the operation of the provisions of this chapter except the provisions of section 336.200:

"(1) Physicians or surgeons of any school lawfully entitled to practice in this state;

"(2) Persons, firms and corporations, not engaged in the practice of optometry, who sell eye glasses or spectacles in a store, shop or other permanently established place of business on prescription from persons authorized under the laws of this state to practice either optometry or medicine and surgery.

"(3) Persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop or other permanently established place of business, and who neither practice nor attempt to practice optometry, and who do not use a trial case, trial frame, test card other than that used by the customer or customers alone, vending machine or other mechanical means to assist the customer in selecting glasses."

A study of Section 336.010, supra, convinces us that the insertion of lenses into spectacles frames is not the practice of optometry. Nor is the adjustment of the frames to the face, which adjustment does not affect or change the measurements upon which the original prescription is based, the practice of optometry.

Honorable J. R. Bockhorst, O.D.:

Our position is substantiated by the Supreme Court of Arkansas in the case of Arkansas State Board of Optometry vs. Keller, 218 Ark. 820, 239 S.W. (2d) 14. The factual situation in that case was, I.c. 16:

"Briefly, the evidence here shows that the examining oculist determines any deficiencies in the patient's vision, notes on a prescription the type and power of corrective lenses and facial measurements, for correct size of frames. The patient takes the prescription to the Medical Arts Optical Service, or any other optician of his choice, to be filled. When taken to Medical Arts, Keller displays different styles of frames to the patient and where the physician or oculist has so requested, he, Keller, will check or verify the facial measurements, and should he discover what he conceives to be an error, he notifies the oculist who would, after re-checking make any corrections he deemed necessary. This final decision always rested with the oculist or physician and not with Keller. After final instructions from the oculist, Keller has the lenses ground in accordance with the prescription, and affixes them to the correct style frame (as the customer may select). All that remains to be done after the actual delivery to the patient is to see if the glasses fit comfortably, which service Keller performs. In some cases, the bridge may pinch or the nose hook may need adjusting, in which event Keller, by bending the offending parts, makes it comfortable."

In construing the Arkansas statute which provided that any person who "prescribes, dispenses, adapts, or duplicates lenses * * * shall be deemed to be engaged in the practice of optometry", the court held that the acts of Keller, as above set-out, did not constitute the practice of optometry.

And, in Palmer vs. Smith, 229 N.C. 612, 51 S.E. (2d) 8, 12, it was held:

Honorable J. R. Bockhorst, O.D.:

"* * * And so long as the optician confines his work to the mere mechanical process of duplicating lenses, replacing or duplicating frames and mountings, 'making mechanical repairs to frames for spectacles', filling prescriptions issued by a duly licensed optometrist or oculist, and does not in any manner undertake 'the measurement of the powers of vision and the adaptation of lenses for the aid thereof', he is not practicing optometry."

By way of contrast we note the case of State vs. Roves, 223 La. 839, 67 So. (2d) 99, holding the adaptation of frames to be the practice of optometry. However, the Louisiana statute specifically provided that the adaptation of frames was the practice of optometry, while the Missouri statutes do not so provide. And in Oklahoma the statute (59 Okla. Stat. Ann., Sec. 942), provides: "It shall be unlawful for any person * * * not licensed * * * to fit, adjust, adapt, or to any manner apply lenses, frames, prisms * * * to the face of any person."

That the statutes of some states specifically touch on the fitting of frames, and the Missouri statutes do not, lends weight to our conclusion that it was not intended to regulate, in Missouri, the adjustment of frames.

CONCLUSION

It is, therefore, the opinion of this office that neither insertion of lenses into spectacles frames, nor the adjustment of such frames to the wearer's face, which does not affect or change the measurements upon which the original prescription is based, are required to be done by registered optometrists.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

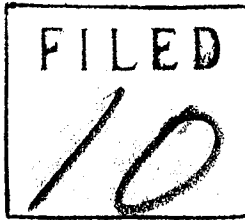
Yours very truly,

PMcG:irk

JOHN M. DALTON
Attorney General

MORTGAGED PROPERTY--removing
or concealing with intent to
defraud:

VENUE:



:The venue in the prosecution of any
:person for removing or concealing
:mortgaged property with intent to de-
:fraud the mortgagee or others, in viola-
:tion of Sec. 561.570, RSMo 1949, lies in
:the county in Missouri from which the
:mortgaged property was removed with the
:intent to hinder, delay or defraud the
:mortgagee.

.....

April 28, 1955

Honorable Joseph M. Bone
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Mr. Bone:

This opinion is issued by this office in response to your request for an opinion on the question of which county would have jurisdiction or be possessed of the venue in the prosecution of an individual for the removal and concealment of mortgaged property with intent to hinder, delay or defraud the mortgagee, under the facts the request recites, in violation of Section 561.570, RSMo 1949. Your request for an opinion on this subject reads as follows:

"I would like to have the opinion of your office on a question of venue under the provisions of Section 561.570 Revised Statutes of Missouri for 1949 relative to the removal and concealment of mortgaged property, with the intent to hinder, delay and defraud the mortgagee. One Lewis Alber 'Tex' Morton while living in Mexico, Missouri executed a note and chattel mortgage dated January 14, 1954 to the Keeton Motor Sales of Mexico, Missouri, giving as security on said mortgage a 1949 Pontiac Chieftain '8' Sedan. Subsequently to the giving of the mortgage he lived around Sturgeon, Missouri in the edge of Randolph County, Missouri near the intersection of State Highway No. 22 and United States Highway No. 63. Around December 17, 1954 Morton apparently left his home in Randolph County with this automobile and the information seems to be that he is somewhere in the State of Texas.

"The question as to venue on which I wish your opinion is whether or not Audrain County would have any jurisdiction to prosecute under this

Honorable Joseph M. Bone:

removal and concealment statute, or whether the venue would have to lie solely in Randolph County.

"It is my opinion under the above facts and under this statute that the venue would have to be in Randolph County, and I so advised Mr. Keeton to see the Prosecuting Attorney of Randolph County, but he returned to my office and stated that the Prosecuting Attorney of Randolph County stated he would have to prosecute in the County of Audrain. It seems to me factually from the case, it is not a question of where the mortgage was executed, but in what county the defendant was located at the time of the actual act of removing and concealing this property."

Section 561.570, RSMo 1949, defining as a graded felony the removal or concealment of mortgaged property of the value of \$50.00 or more with intent to hinder, delay or defraud the mortgagee, trustee or beneficiary, his heirs or assigns, reads as follows:

"1. Every mortgagor or grantor in any chattel mortgage or trust deed of personal property who shall sell, convey or dispose of the property mentioned in said mortgage or trust deed or any part thereof, without the written consent of the mortgagee or beneficiary and without informing the person to whom the same is sold or conveyed that the property is mortgaged or conveyed by such deed of trust or who shall injure or destroy such property or any part thereof or aid or abet the same, for the purpose of defrauding the mortgagee, trustee or beneficiary or his heirs or assigns or shall remove or conceal or aid or abet in removing or concealing such property or any part thereof, with intent to hinder, delay or defraud such mortgagee, trustee or beneficiary, his heirs or assigns, shall, if the property be of the value of fifty dollars or more, be deemed guilty of a felony and upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county

Honorable Joseph M. Bone:

jail not exceeding six months, or by a fine of not less than one hundred dollars, or by both such fine and imprisonment."

The authorities of every jurisdiction, both text and decision, hold that for a criminal offense the defendant must be both charged and tried in the county where the crime was committed. That is the law of this State. In *ex parte Slater*, 72 Mo. 102, Habeas Corpus, the Supreme Court of this State construing the Constitution of 1875 on the question of venue, l.c. 107, said:

"Reading section 12, article 2, of the constitution, in the light of the well understood meaning of the word indictment at common law as modified by section 28, article 2, of the bill of rights, and it would read thus: 'No person shall, for a felony, be proceeded against criminally otherwise than by an indictment, that is, otherwise than by an accusation at the suit of the State, by the oath of nine men (at least, and not more than twelve), in the same county wherein the offense was committed, returned to inquire of all offenses, in general, in the county determinable by the court in which they are returned, and finding a bill brought before them to be true.'

"If this is the true reading of section 12, supra, (and we cannot perceive how it is susceptible of any other,) it guarantees to every person the right to be exempt from criminal prosecution for a felony except upon an accusation or indictment preferred by a grand jury of the county where the offense was committed, * * *."

The question of where the venue lies in the case noted here arises, as it is disclosed in your request, from the removal of mortgaged property from Audrain County to Randolph County, both in this State, and thence from Randolph County, it is said, to some unknown place in the State of Texas by the mortgagor of such property which, in the request, is said to be an automobile.

The statute makes the removal or concealment of mortgaged property with intent to hinder, delay or defraud the mortgagee, trustee or beneficiary, his heirs or assigns the gravamen of the offense denounced by this section. The St. Louis Court of Appeals

Honorable Joseph M. Bone:

so held in State vs. Klick, 282 S.W. 161. The court, so holding, there said:

"The instructions given on behalf of the state direct a verdict of guilty without requiring the jury to find that defendant removed the mortgaged property with intent to hinder, delay, or defraud the mortgagees. This specific intent is an essential element of the offense charged in the information and denounced by the statute, and it was error to direct a verdict without requiring a finding by the jury of such intent. * * *."

The statute does not make the physical act alone of removing mortgaged property from one county to another, or from a county in this State to another State, an offense. The Springfield Court of Appeals in United Iron Works Co. vs. Sleepy Hollow Mining and Development Co., et al., 198 S.W. 443, in effect, so held, saying, l.c. 444:

"The property mortgaged, being personal property, could be moved at will by the mortgagor, such removal at most subjecting him to having the mortgage foreclosed, so that, the lien of the mortgage having once attached, the subsequent removal of the property to another locality and county would in no wise destroy the mortgage lien or subordinate it to a subsequent lien. * * *."

The removal of such property from one place to another in order to constitute a criminal offense must be with the intent to hinder, delay or defraud as provided by the statute. That is, the intent to defraud some person named in the statute or in the chattel mortgage contract. The intent to hinder, delay or defraud the mortgagee may be proven in satisfaction of the requirement of the statute by direct testimony or it may be inferred from all the facts connected with the act of removing such property, as shown by the evidence in the case, but such intent in the removal or concealment of the mortgaged property with the intent to hinder, delay or defraud the mortgagee must be proved in the trial before the jury. An instruction to that

Honorable Joseph M. Bone:

effect was approved by our Supreme Court in State vs. Griffin, 228 S.W. 800. That instruction appears at page 804. It reads as follows:

"The intent with which an act is done may be proved by direct and positive testimony, or the intent may be inferred from all the facts and circumstances surrounding and attending the act as shown by the evidence in the case, and the intent in this case must be determined from the evidence given in this case."

The court in any case will declare the law of the case, and will do so in this situation, if it reaches the courts, but the jury must pass upon all the issues of fact in the prosecution of an individual charged with a criminal offense. 11 C.J. 646, states pertinent text on this principle at page 646. That text reads as follows:

"It is for the jury to pass on all issues of fraudulent intent accompanying the sale or removal of the mortgaged goods, and such intent is an inferential fact to be drawn by the jury, and must be gathered from all of the attendant facts and circumstances. Thus, it has been held that a proof of the sale or removal of the mortgaged property with a knowledge of the lien will authorize a jury to infer a fraudulent intent, unless there are attending circumstances to repel the inference. Where a statute makes it an offense for one to do certain acts with an intent to 'hinder, delay or defraud the mortgagee,' it is for the jury to determine whether or not the act complained of will produce the result specified in the statute."

CONCLUSION

Considering the premises, it is the opinion of this office that the venue in the prosecution of the mortgagor in this case for violation of the terms of Section 561.570, RSMo 1949, for removing and concealing, if the facts disclose he has committed these acts, mortgaged property of the value of \$50.00 or more,

Honorable Joseph M. Bone:

belongs in the county in Missouri from which the mortgaged property was removed with the intent to hinder, delay or defraud the mortgagee.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON
Attorney General

GWC:lrk

ELECTIONS:
REGISTRATION:
VOTERS:
QUALIFIED VOTERS:
SENATE BILL #297:



The county clerk of those counties coming within the provisions of S.B. 297 is required by Section 116.040, RSMo 1949, to register all persons who seek registration after August 29, 1955, using the three card system stated in said Sec. 116.040; under Sec. 116.060, RSMo 1949, county clerk of those cities coming within said bill 297 must maintain and distribute the three registration cards and binders called for that he has at that time, and for those voters for whom he has none he must use the old registration books made up under Chapters 114 or 115.

September 6, 1955

Honorable Joseph M. Bone
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"I would like to have the opinion of your department on the following matter:

"Under your opinion of August 3, 1955 relative to persons who are registered prior to July 1, 1955, in cities covered by Senate Bill No. 297, 68th General Assembly, are not required to register by Section 116.040, R.S. Mo. 1949.

"(1) However, this question has been raised by the County Clerk of Audrain County, Missouri. The registration under Section 114.110, R.S. Mo. 1949 proceeds on a different basis than the requirements under Section 116.040, R.S. Mo. 1949 in that under the old registration there is now one registry book and one registry card for voters to sign. Under the new registration Section 116.040 it requires that three cards be signed when the voter registers. The three card system won't fit the one card system binders. Presently under the old registration law effective in this county there are now eight binders and under the new system it would require sixteen binders plus the one permanent registration binder.

Honorable Joseph M. Bone

"(2) The second question in this connection is that if the old method of registration is continued as to those registered prior to July 1, 1955, how can the County Clerk comply with the requirements under Section 116.060, R.S. Mo. 1949 as to the maintenance and distribution of the three registration cards, the pink, the blue and the white registration cards.

"I would appreciate having your opinion on this matter, and also, I would like to have a copy of your previous opinion of 8-3-55."

Section 116.040, RSMo 1949, reads as follows:

"1. Each person who shall offer to register under this chapter shall appear at the office of the county clerk within the time and hours herein stated. Such persons shall answer truthfully all questions as to identity, residence and qualifications called for by the registration records required by this chapter. There shall be provided by the county clerk three sheets or cards for the registration of each voter. Said cards or sheets shall be adapted for use in loose leaf or card registration binders. One of said sheets or cards provided for each voter shall be tinted pink, one blue and another white. Said cards or sheets shall contain the following information:

Name
Address
Street and No.
Location of Resident's place of
Birth
Color Sex Age . . .
Occupation
Term of Residence
.....State County
Precinct
Naturalized--Court in which Naturalized--
Sworn (Yes or No)
Remarks:

Voter's Signature

.

Honorable Joseph M. Bone

"On each registration sheet, and below the elector's signature, shall be the following form, which shall be kept by the judges of election:

<u>Election</u> <u>Date</u>	<u>Registration</u> <u>Number</u>	<u>Voted</u>	<u>Rejected</u>
--------------------------------	--------------------------------------	--------------	-----------------

Remarks

"At the time of registration, and after supplying the information called for on said registration records, each person shall write his full name on each of the three registration records and shall, at the same time, take the following oath, which shall be inscribed above his or her signature on each sheet, as follows:

Affidavit of Registration

The undersigned affiant, being duly sworn, says:

'I hereby swear (or affirm) that the statements made herein are true and that on or before the next ensuing primary or election I will be at least twenty-one years of age, and that I am or will be, on said date, a qualified elector in the city of _____.'

"2. If any applicant is unable to sign his name, the application for registration shall be written for him and the affidavit of registration shall include, under 'Remarks,' the date of birth, the height in feet and inches, color of eyes and any distinguishing marks. He shall then sign the application for registration and affidavit by making his mark in the usual manner."

The registration cards to be used under this chapter and the section stated above are to be used only in the registration of those persons registering under Chapter 116. In other words, those persons who have not registered prior to July 1, 1955, must register in accordance with Senate Bill No. 297. Thus, in applying this section to those persons who are not required to register

Honorable Joseph M. Bone

under Chapter 116 and Senate Bill No. 296, there will be no cards for those persons as called for in Section 116.040, but as to those persons who are required to register now under Chapter 116, the three card system shall be used. As you state in your letter, a county clerk in a county where there was held registration under Chapters 114 and 115 will have two sets of registration books. He will have to keep the old registration books until there is a complete set of the new card registration books. Undoubtedly the Legislature did not consider this problem when it enacted Senate Bill No. 297. This office may sympathize with the counties wherein they will have to keep, as you say in your county, eight binders for the old registration law and sixteen binders, plus one permanent registration binder, for the new system.

Your second question is how can the county clerk comply with the requirements of Section 116.060, RSMo 1949, as to the maintenance and distribution of the three registration cards. Said Section 116.060 reads as follows:

"Within twenty days after the last day of the first general registration herein provided for, the county clerk shall cause the pink and blue affidavits of registration to be arranged into permanent binders, one binder with pink sheets and one binder with blue sheets for each precinct, and the same shall be arranged alphabetically in said precinct binders. The white sheets shall be arranged alphabetically in a separate binder, without regard to precinct or ward. Said sheets shall be enclosed in a loose-leaf system, with a substantial, strong binding, and each book shall have a lock on the binding so that said sheets or cards cannot be removed without unlocking said binder. The county clerk shall be the custodian of said registration records, and no sheets or records shall be removed or transferred from said binders except under his direction and supervision. The registration records with pink sheets shall be continuously revised and securely kept by the county clerk in his vault, except when given to the appointed election judges for use at elections. The registration books with blue sheets shall be continuously revised and securely kept by the county clerk in his vault and never permitted to leave his custody, except where given to an election

Honorable Joseph M. Bone

judge to be used at the polls in the event that the pink records are lost or are not available for use at the polls on any election day. The record with white sheets, which shall be known as the 'master record', shall be kept by the county clerk in his vault at all times and shall be open to inspection of the public. All three records shall be continuously revised and kept up to date. The county clerk, on the day before any primary or general election for which registration is made, shall deliver, or cause to be delivered, to the judges of election, appointed under and by virtue of the general laws of election, proper registration records for their respective precincts and shall take a receipt, or cause the same to be taken, from the judge to whom the same may be delivered and keep same on file until said records are returned. All affidavits required by this chapter shall be preserved by the county clerk until canceled as a part of the registration records to which they relate."

It will be noted that the first sentence of this section states that within twenty days after the last day of the first general registration is provided for, and then goes on to state the duties of the county clerk. Under Senate Bill No. 297 we had no general registration in those cities under Senate Bill No. 297. Thus, the Legislature has left it in doubt as to when the county clerk shall arrange the binders for the three card registration index. This office believes that the county clerks in those counties and cities coming under Senate Bill No. 297 should use the old registration binders in conjunction with the binders of the new three card indices in elections until the time there is a three card indices completed. Although there is no expressed provision for doing this, this office believes that it is implied by the fact that the Legislature in enacting Senate Bill No. 297 stated that those persons who had registered prior to July 1, 1955, would not have to register under Senate Bill No. 297 unless otherwise obligated to do so by Chapter 116, RSMo 1949. Thus, the Legislature undoubtedly contemplated that the county clerks should use the old registration lists and binders along with the new cards and binders until the new set of the three card indices would be complete. Such old lists and books should be used along with the new lists and binders in following the provisions of Section 116.060, RSMo 1949.

Honorable Joseph M. Bone

CONCLUSION

It is the opinion of this office that the three card registration provided for in Section 116.040, RSMo 1949, shall be applied to every person registering under Chapter 116 and that the county clerk should keep a proper indices of such cards by use of binders and until he has a complete set of such he should also keep the old registration lists and binders that were made up either under Chapter 114 or 115, and that the old registration lists and binders should be used at subsequent elections, along with the registration cards and binders of new voters who have registered under Chapter 116, until a complete registration of voters has been made by the county under Chapter 116.

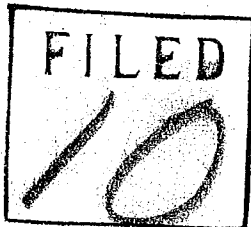
The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

Yours very truly,

John M. Dalton
Attorney General

HLV:vlw

INSANE PERSONS:
CONSTITUTIONAL LAW:



Procedure outlined in Sec. 4 of S.B. No. 59, 68th General Assembly, guarantees "due process." Secs. 5 and 6 of said Act do not require alleged insane person to ask for judicial determination of his alleged insanity before temporary commitment. Sec. 29 of said Act defines a criminal offense and is enforceable.

September 29, 1955

Honorable Gordon R. Boyer
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

This opinion is rendered in reply to your inquiry reading as follows:

"I have been furnished with copy of Senate Bill No. 59 which contains the new code for handling insanity cases. I am of the opinion that this bill has all of the evils of the former bill which I believe you found to be unconstitutional in an opinion a year or so ago. The first part of the act as to involuntary hospitalization would appear to me to be legal but the proceedings provided for in Section 4 in my opinion completely denies the person due process of law. Sub-Section 2, Section 4 provides for a certification by two physicians that the patient lacks sufficient insight or capacity to make his own application. Sub-Section 3 then provides that he be served with a notice and unless he makes known to the Welfare Office that he desires to have a hearing he can within 5 days be transported to the hospital. If the patient does not have sufficient capacity to make an application originally for a judicial hearing, how can he be expected to have judicial capacity to demand a hearing.

"Under sections 5 and 6 apparently a patient can be transported and confined to the hospital upon the written application of a police officer and a certificate of one doctor with no hearing

Hon. Gordon R. Boyer

of any sort. This last provision, it is true is a temporary confinement, but it also has the vice that the patient himself must ask for a judicial determination.

"There is no saving clause in this act and it would appear to me that if it was unconstitutional in part the whole act must fail.

"I also call your attention to Section 29 which states that if any person causes or conspires to cause an unwarranted hospitalization or denies any of his rights he shall forthwith be punished. This section does not state whether it would be a felony or a misdemeanor and does not require conviction and in my opinion could not be enforced. I will appreciate an opinion as to the constitutionality of this act and the enforceability of Section 29."

You have directed complaints to Sections 4, 5, 6 and 29 of Senate Bill No. 59, passed by the 68th General Assembly of Missouri, and effective August 29, 1955. This recent Act repeals House Bill No. 355 passed by the 67th General Assembly and held to have "constitutional infirmity" by the Supreme Court of Missouri in the case of State ex rel. Fuller v. Mullinax, 269 S.W. (2d) 72, decided June 14, 1954.

Sections 4, 5 and 6 of Senate Bill No. 59, read as follows:

"Section 4. 1. Any individual may be admitted to a hospital upon:

"(1) Written application to the hospital by a friend, relative, spouse, or guardian of the individual, a health or public welfare officer, or the head of any institution in which such individual may be; and

"(2) Certification by two licensed physicians that they have examined the individual and that they are of the opinion that he is mentally ill, and is in need of care or treatment in a mental hospital, and because of his illness, lacks sufficient insight or capacity to make responsible application therefor.

Hon. Gordon R. Boyer

"2. The certification by the physicians may be made jointly or separately, and may be based on examination conducted jointly or separately, as the regulations of the division may prescribe. An individual with respect to whom such certification has been issued may not be admitted on the basis thereof at any time after the expiration of fifteen days after the date of examination exclusive of any period of temporary detention authorized under section 8.

"3. A copy of the application and the certification by the physicians shall be filed with the county welfare department. The head of the county welfare department or any other person designated by him shall serve the individual by delivering to him a written notice that application for his admission to a hospital for care and treatment for mental illness has been made; that such application is supported by medical certification; and that such individual will be transported and admitted to the hospital designated in the notice unless within five days after service of such notice such individual makes known to the county welfare department that he desires to have judicially determined whether he should be taken and admitted to such hospital, which request may be made orally or in writing. The serving person contemporaneously with such service shall deliver to such individual a printed or typewritten request for such judicial determination, complete except for the signature of the individual, addressed to the county welfare department whose address shall be designated in the written notice. If within five days the individual signs and mails or delivers such request or otherwise notifies the county welfare department of his request for a judicial determination, he shall be deemed to have made the desired request. If no request is made the individual may be transported and admitted to the hospital. If such request is made thereof shall be given promptly to the person who made the application, who within five days shall commence proceedings for a judicial determination under Section 3. If such proceedings are not commenced within such five days the application and certification shall be void. Upon completion of the service the serving person shall make an affidavit that he made the service and delivered the request, and file the affidavit with the clerk of the probate court.

Hon. Gordon R. Boyer

"Section 5. 1. Any individual may be admitted for temporary confinement to a hospital upon:

"(1) Written application to the hospital by any health or police officer or any other person stating his belief that the individual is likely to cause injury to himself or others if not immediately restrained, and the grounds for such belief; and

"(2) A certification by at least one licensed physician that he has examined the individual and is of the opinion that the individual is mentally ill and, because of his illness, is likely to injure himself or others if not immediately restrained.

"2. An individual with respect to whom such a certificate has been issued may not be admitted on the basis thereof at any time after the expiration of three days after the date of examination.

"3. Such a certificate, upon indorsement for such purpose by a judge of any court of record of the county in which the individual is present, shall authorize any health or police officer to take the individual into custody and transport him to a hospital as designated in the application.

"Section 6. 1. Any health or police officer may take an individual into custody, apply to a hospital for his admission and transport him thereto for temporary confinement if such officer has reason to believe that;

"(1) the individual is mentally ill and, because of this illness is likely to injure himself or others if allowed to be at liberty pending examination and certification by a licensed physician; or

"(2) the individual, who has been certified under Section 5 as likely to injure himself or others, cannot be allowed to remain at liberty pending the indorsement of the certificate as provided in that section.

Hon. Gordon R. Boyer

"2. The application for admission shall state the circumstances under which the individual was taken into custody and the reason for the officer's belief."

With reference to Section 4 of Senate Bill No. 59, your complaint seems to be clearly stated in the question found in the last portion of the first paragraph of your inquiry, and reading as follows:

"If the patient does not have sufficient capacity to make an application originally for a judicial hearing, how can he be expected to have judicial capacity to demand a hearing." (?)

The answer to the above question is not to be found in the language of the Act, and such question may or may not have entered the collective mind of the legislature when Section 4 of the Act was written. However, Section 4 contemplates involuntary, rather than voluntary commitment. The procedure outlined in this portion of the law is so worded as to give the individual who is to be hospitalized an "opportunity to be heard in advance of commitment," and if such person is so mentally incapacitated as to be unable to fully appreciate the "opportunity to be heard in advance of commitment," such fact does not in the least lessen the force of the law's provision which guarantees that he be afforded the right to be heard. The present language of Section 4 of the Act would seem to meet the objection made by the Supreme Court in *State v. Mullinax*, 269 S.W. (2d) 72, 1.c. 77, reading as follows:

"We are clearly of the opinion, and so hold, that for the statute in operation to thus deprive a person of his liberty without an opportunity to be heard in advance of commitment, if he or those acting for him desire it, would constitute a denial of due process, and accordingly render the statute, in its present form, unconstitutional."

The statement contained in the second paragraph of your inquiry correctly refers to the confinement authorized under Sections 5 and 6 of the Act as being "temporary confinement," but we fail to discover that under such "temporary confinement" procedure the "patient himself must ask for a judicial determina-

Hon. Gordon R. Boyer

tion" before temporary commitment as you indicated in language found in paragraph two of your inquiry. Section 7 of the Act sets forth the procedure to be followed when a commitment is accomplished under Sections 5 or 6 of the Act, and provides as follows:

"Section 7. 1. Within five days after the admission of any person under the provisions of sections 5, or 6 the head of the hospital shall notify the probate court of the county of residence of such patient. Such notification shall contain the full name of the patient, his address, manner of admission, the name of his next of kin, spouse or guardian, and such other information concerning the patient as may be necessary.

"2. Upon receipt of the notice the judge shall note it on his docket and if no proceeding is instituted under section 3 by any person authorized to do so within five days, he shall order the patient's release. The head of the hospital upon receipt of the order of release shall release the patient immediately.

"3. If the proceeding under section 3 is instituted within the five-day period, the court shall hold the hearing therein provided for within ten days thereafter and shall order that all preliminary acts required by section 3 be performed before the hearing. The court may order the temporary confinement continued until the rendition of judgment in the proceeding, but the judgment shall be rendered not later than five days after the end of the hearing."

We fail to discover any language in Sections 5, 6 or 7 of the Act which would give offense to the following language found in State v. Mullinax, 269 S.W. (2d) 72, l.c. 76:

"Both sides recognize that the state, in the exercise of the police power, may provide for the summary apprehension of an alleged insane person, dangerous to self or to others, and his temporary detention (without notice or hearing) until the truth of the charges can be investigated. In re Moynihan, 322 Mo. 1022, 62 S.W. 2d 410, 91 A.L.R. 74."

Section 29 of the Act reads as follows:

Hon. Gordon R. Boyer

"Section 29. Any person who willfully causes, or conspires with or assists another to cause, the unwarranted hospitalization of any individual under the provisions of this act, or the denial to any individual of any of the rights accorded to him under the provisions of this act, shall be punished by a fine not exceeding five thousand dollars or imprisonment not exceeding five years, or by both such fine and imprisonment."

In the last paragraph of your inquiry you have asked concerning the enforcibility of Section 29 of the Act, quoted above. We consider that such statute clearly informs any and everyone who commits the acts prohibited by the statute that a "crime," "offense" or "criminal offense" has been committed as such terms are defined in the following language from Section 556.010, RSMo 1949:

"The terms 'crime,' 'offense,' and 'criminal offense' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

It must be reasonably concluded that Section 29 of Senate Bill No. 59, quoted supra, describes acts constituting an offense, with specific punishment prescribed therefor, and is well within the rule stated in State v. Kornegger, 255 S.W. (2d) 765, 363 Mo. 968, 1.c. 974, in the following language:

"It is, of course, true that the defendant in a criminal cause has a constitutional right to demand the nature and cause of the accusation against him, and a criminal statute must be sufficiently clear that there can be no doubt as to when such statute is being violated."

This opinion has been addressed to inquiries directed to specific sections of Senate Bill No. 59 and it is not deemed necessary to apply constitutional tests to other sections of the Act until their constitutionality is brought into question.

CONCLUSION

It is the opinion of this office that procedure outlined in Section 4 of Senate Bill No. 59, passed by the 68th General Assembly of Missouri, and effective August 29, 1955, guarantees "due process"; that Sections 5 and 6 of said Act, providing for temporary commitment of alleged dangerously insane persons

Hon. Gordon R. Boyer

do not contain any provision that the alleged insane person must, himself, ask for a judicial determination of his alleged insanity, before temporary commitment and that Section 29 of said Act, being the penal section of said Act, is a statute defining a criminal offense and is enforceable.

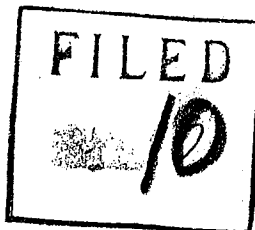
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:vlw,bi

HOSPITALS:
COUNTY HOSPITALS:
BOARD OF TRUSTEES:



County hospital board of trustees' rule that, for a short time, the name of any patient who has died will be withheld from public pending notification of next of kin, is reasonable regulation and thus authorized by Secs. 205.190(4) and 205.280, RSMo 1949, but the rule that any patient who expressly requests it need not have his name revealed is unreasonable and thus violates these sections.

October 17, 1955

Honorable Joseph M. Bone
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I am enclosing a copy of a letter which I received from Mr. Robert M. White, II, general manager of the Mexico Ledger, which is self-explanatory.

"I would appreciate the opinion of your department on the question if a citizen of Audrain County or a newspaper can require the Audrain County Hospital personnel to make available for inspection and information accurate lists of who is a patient at the Audrain County Hospital, who died there and who was born there. Such information would, of course, not seek to inquire what is wrong with them, just merely the news facts of patients admitted, names of those who died and those who are born there.

"It seems that in answer to this request made to the Board of Trustees by the Mexico Ledger, the Board of Trustees through a letter dated August 10, 1955, and signed

Honorable Joseph M. Bone

by C. R. Stribling, Chairman of the Board of Trustees, stated it would make available lists of admissions, discharges, births, deaths and other pertinent information relative to the hospital census, 'however, the Board will withhold from this list the name of any patient who expressly requests it, and, for a reasonable time, the name of any patient who has died pending notification of the next of kin'."

Two provisions of the county hospital law are relevant to your inquiry: Section 205.190 (4) provides:

"The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. * * *"

Section 205.280 provides:

"When such hospital is established the physicians, nurses, attendants, the persons sick therein and all persons approaching or coming within the limits of same, and all furniture and other articles used or brought there shall be subject to such rules and regulations as said board may prescribe."

These rules and regulations promulgated by the hospital board of trustees must be reasonable. See 41 C.J.S., Sec. 5, pages 336-337. Consonant with this general principle, the Supreme Court of Arkansas, in *Ware v. Benedikt*, 280 S.W. 2d 234, at p. 236, recently held that a public hospital may enact rules and regulations "which bear a reasonable and fundamental relation to the safety, interest, and welfare of patients and the general public."

The issue then is whether these two rules of the Audrain County Hospital Board of Trustees bear this reasonable relation

Honorable Joseph M. Bone

to the welfare of both patients and public. It seems to us that the practice of the Board in withholding the names of deceased patients until an effort has been made to notify the next of kin is clearly fair and within the public interest. To imply that a newspaper should print such information, and that people should thus circulate the news, before an attempt has been made to notify next of kin is to ignore the consequences to those relatives from hearing this information in an indirect manner. It should be added, however, that the effort to notify next of kin must not consume a long period of time. For this purpose, a few hours would seem to suffice.

The other regulation allows the name of any patient to be withheld if he so requests. Taxpayers are entitled to know how their money is being spent by their county hospital. For this object, the names of the patients are as essential as the number of patients in the hospital. To say that one entering a county hospital must reveal his name to the public is to hold, of course, that these patients should receive less privacy than those who may enter a private hospital.

Yet, when one enters a county hospital, he subjects himself to certain requirements which he would not have to undergo in a private hospital. A public hospital is "an institution owned by the public and devoted chiefly to public uses and purposes." 41 C.J.S., Sec. 1, page 332. In the formulation of rules governing a county hospital, the public's right to knowledge must be given a consideration which need not be accorded by the regulations of a private hospital. To require the release of patients' names would not jeopardize the care given them by the hospital and would, moreover, satisfy the public's proper interest in the management of its tax-supported institution.

This second regulation is, thus, unreasonable, or in the words of the Missouri Supreme Court, "arbitrary, capricious and illegal," thereby justifying a court's setting it aside. See *State ex rel. Swofford et al. v. Randall et al.*, 236 S.W. 2d 354; *In re Botz*, 159 S.W. 2d 367, 236 Mo. App. 566. The abrogation of this rule should threaten neither the welfare of the patient nor the orderly management of the hospital.

CONCLUSION

It is, therefore, the opinion of this office that a county hospital board of trustees' rule, that for a short time the name of any patient who has died will be withheld from the public

Honorable Joseph M. Bone

pending notification of next of kin, is a reasonable regulation and thus authorized by Section 205.190(4) and Section 205.280, RSMo 1949, but the rule, that any patient who expressly requests it need not have his name revealed, is unreasonable and thus violates these sections.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walker La Brunerie, Jr.

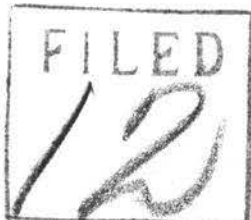
Yours very truly,

John M. Dalton
Attorney General

WLaB:vlw

AUTOMOBILES:
MOTOR VEHICLES:
RECIPROCITY WITH OHIO:

Missouri does not have reciprocity with Ohio with respect to commercial vehicles having three or more axles, and such commercial vehicles owned by Ohio residents should be required to register in Missouri.



September 14, 1955

Mr. David A. Bryan
Supervisor
Motor Vehicle Registration
Department of Revenue
Jefferson City, Missouri

Dear Sir:

You recently requested from this office an opinion concerning the following matter:

"1. The state of Ohio assesses an axle-mile tax on all Missouri registered commercial vehicles having three or more axles, including those engaged in interstate operation. The rate per mile varies from $\frac{1}{2}$ ¢ to 2 $\frac{1}{2}$ ¢ depending upon number of axles and type of combinations.

"2. During a ten state meeting in Chicago, Illinois August 29, 1955, I was advised by the Chairman of the Ohio Reciprocity Board that the Board had no intention of waiving the tax, regardless of circumstances, although they do have authority to do so.

"3. In view of the above, an opinion from your office is respectfully requested relative to Section 301.270 on the following questions.

- a. Does Missouri have reciprocity with Ohio with respect to commercial vehicles having three or more axles?
- b. Should Missouri require Ohio registered commercial vehicles having three or more axles to register in Missouri?"

Mr. David A. Bryan

The Missouri law on reciprocity is found in Section 301.270 RSMo 1949, which reads as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

On the basis of the facts stated in your request, i.e. that Ohio charges vehicles owned and registered by Missouri residents in Missouri its axle-mile tax, and that the Ohio Reciprocity Board has stated that it will not grant reciprocity to such Missouri trucks even though such board has authority to do so, it would appear that as to such vehicles having three or more axles, Missouri does not have reciprocity with Ohio. It will be noted from the statute quoted above that the reciprocity authorized only operates to the extent that Missouri operators are given like privileges by the State of Ohio and, since Ohio takes the position that they will impose their taxes and fees upon such Missouri vehicles, Missouri will likewise impose its taxes and fees upon such Ohio vehicles.

CONCLUSION.

It is, therefore, the conclusion of this office that the answer to your question "a" is that Missouri does not have reciprocity with Ohio as to commercial vehicles having three or more axles.

Mr. David A. Bryan

In answer to your question "b," commercial vehicles with three or more axles which are registered in Ohio by Ohio residents should be required to register in Missouri and pay all fees etc. required for such registration.

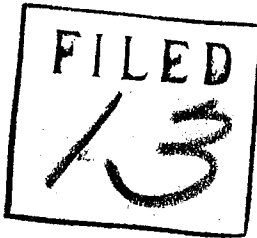
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:sm

TAXES: The City of Doniphan should not pay taxes upon its
MUNICIPALITIES: city hall.



January 5, 1955

Honorable Charles B. Butler
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"This is the last time I will bother you for an opinion. My term expires day after to-morrow.

"Doniphan has a city hall. It is two stories high. The lower part is rented for a drug store. Upstairs three offices are rented to private individuals. I would like to have your opinion as to whether or not the city should pay state and county and school taxes.

"In your opinion does the city have the authority to rent city property for private use? In your opinion the John Hosmer, Marshfield, Missouri, of December 20, 1954, you held that the County Court had no authority to rent space in the court house to private persons for private purposes. Why would it not apply to city property?"

In answer to your first question we direct your attention to the case of School District of Berkeley v. Evans, et al. 250 S.W. 2d. 499, at l.c. 499, 500 of its opinion in the above case, the Missouri Supreme Court stated:

"(1) Section 6 of Article 10 of the 1945 Constitution of Missouri reads as follows:

"All property, real and personal, of

Hon. Charles B. Butler

the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void.'

"It will be noted that the section of the Constitution provides that all property of the state and other political subdivisions shall be exempt from taxation. The same section provides that property used exclusively for religious worship, schools, etc., may be exempted from taxation by general law. (Italics ours.) The test to be applied to property held by the state and its political subdivisions is ownership while the test as to other exemptions which may be granted by general law is whether the property is being used for the purposes enumerated. The rule applicable in such a situation is thus stated in 61 C.J. 420, Section 455:

"* * *Where municipal ownership is made the sole test of the exemption, the purpose of the use is immaterial, especially where use is made a condition in other exemption provisions in the constitution and omitted in the provision relating to municipal corporations, and even where the exemption statute further provides that 'nothing herein contained shall be construed to exempt from taxation any part of a lot or building used for any private purpose or for profit,' where the exemption itself is construed as having no reference to city property; * * *"

Hon. Charles B. Butler

"In the case of City of Yankton v. Madison, 70 S.D. 627, 20 N.W. 2d. 371, the court reviewed this question. Note what the court said, 70 S.D. loc. cit. 631, 20 N.W. 2d. loc. cit. 372: 'Several of the states have identical or similar constitutional provisions, and they are generally construed to require the exemption of property owned by municipal corporations irrespective of use.'

"(2) Appellants in the brief concede that property legally acquired by a city cannot be taxed but it is argued that the purchase of the plant in question by the City of St. Louis was illegal and, therefore, the property is subject to taxation."

We believe the above to be decisive and that the answer to your first question is that the city should not pay taxes on the city hall.

We do not believe that your second question involves matters which properly come within your jurisdiction as prosecuting attorney and so we do not undertake to specifically answer that question. However, as perhaps being helpful in regard to it, we enclose a copy of an opinion written to Honorable Joe M. Carter, Secretary of the Chamber of Commerce, Doniphan, Missouri.

Conclusion

It is the opinion of this department that the City of Doniphan should not pay taxes upon its city hall.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

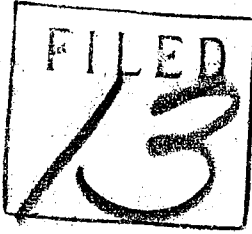
HPW:mw

Enc.(9/2/38 to Joe Carter)

John M. Dalton
Attorney General

SALES TAX:
TAXATION:
PUBLIC UTILITIES:

Electrical current used to prevent
electrolysis of pipe lines not subject to
sales tax.



December 7, 1955

Honorable W. H. Burke
Assistant Supervisor
Sales Tax Division
Department of Revenue
Jefferson City, Missouri

Dear Mr. Burke:

This office is in receipt of a request from you for an opinion as follows:

"We have a request from a common carrier pipe line company for an exemption from sales tax on invoices for electricity used by them in cathodic protection units at various points in Missouri.

"These units are for the purpose of preventing electrolysis or deterioration of the lines by static electricity which forms on the pipes from various causes. This static electricity builds up to a point where a discharge into the ground occurs, and at this point electrolysis or pitting of the pipe occurs unless these cathodic protection units are installed. This condition does not effect the operation of the common carrier in transporting oil inside the pipes, and the cathodic units are for the purpose of greatly prolonging the life of these pipes.

"The common carrier claims that under Rule 57 of our Rules and Regulations that they should be exempted from paying sales tax on these invoices and therefore desire a refund of the sales tax already paid by them for the past two years. Will you please advise if they should be exempted from the sales tax on these transactions?"

Honorable W. H. Burke

The purpose of the use of the electrical current, the sales tax upon which is in question here, is shown to be for the protection of the steel pipe in the company's pipe line. Its use does not extend to the furtherance of the movement of the oil in the pipe in interstate commerce as we understand it in your request letter. It is alleged to be exempted from the purview of the tax according to Rule 57. It is thought best to quote Rule 57 of the rules and regulations relating to the Missouri Sales Tax (revised to November 1, 1953) which is quoted in what we think to be the applicable part as follows:

"The sales tax is imposed on sales of electricity, electrical current, water and gas to domestic, commercial or industrial consumers only and is not imposed on sales to other classes of consumers (Kansas City Power & Light Co. v. Smith, State Auditor, 111 S.W. (2d) 513). Examples of consumers that cannot be classified as commercial consumers are public utilities, waterworks, telegraph and telephone companies, railroads and street railways and other common carriers when the electricity, electrical current, water and gas are not used in commercial phases of the business. The tax does apply when the electricity, electrical current, water and gas are used in sales rooms, display rooms, retail stores, downtown ticket offices, and other such commercial phases of the above consumers business."

This above rule appears to have been formulated in accordance with Sections 144.010 and 144.020, RSMo 1949. Section 144.020, Subdivision 3 is as follows:

"3. A tax equivalent to two per cent of amounts paid or charged on all sales of electricity or electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers."

Rule 57, in the portion quoted above, seems to have been developed from consideration of the above quoted portion of the Sales Tax Act and to have been further modified by the decision in Kansas City Power and Light Co. v. Smith which it quotes. It is believed, that in view of the decision in the above case, that the use of electrical current, for the purposes described in the opinion request, cannot be determined to be for domestic, commercial

Honorable W. H. Burke

or industrial consumption. It is thought best to here quote from the Power and Light Company case at 1.c. S.W. 515 as follows:

"(6) If appellant is correct in his contention that the word 'commercial' includes everything pertaining to commerce, then it would also include industrial pursuits; for instance, a shoe manufacturer is engaged in an industrial pursuit in making and selling shoes. If 'commercial' is used in its broad sense, it includes also the word 'industrial.' This the appellant admits, for in his brief he says: 'We respectfully urge upon this court that the term "commercial" as used in this act, might include in its scope "industrial," for both are closely associated; "commercial" includes "industrial."' If the word 'commercial' includes 'industrial,' then why did the Legislature use the word 'industrial' also? We have already seen that every word should be given a meaning in construing a statute if possible; we therefore conclude that the word 'commercial' was not used by the Legislature with the intention of including the word 'industrial.' Both were used in the act, not in the broad sense, but, rather, in a restricted sense.

"The ordinarily accepted use of the phrase 'commercial establishment' denotes a place where commodities are exchanged, bought, or sold, while the ordinarily accepted meaning of the phrase 'industrial establishment' denotes a place of business 'which employs much labor and capital and is a distinct branch of trade; as, the sugar industry.' Webster's New International Dictionary. Thus, we see that the transportation of passengers would not come within the ordinary meaning of either the word 'commercial' or 'industrial.'"

Of course, since it is a generally accepted rule that taxing statutes should be strictly construed in favor of the tax payers, we must come to the conclusion that the purpose of the use of the electrical current sought to be charged with sales tax is neither domestic, commercial nor industrial under the

Honorable W. H. Burke

strict meaning of those terms and as they are construed by our Supreme Court.

CONCLUSION

It is therefore the opinion of this office that electrical current used by a common carrier pipe line in a process for the protection and preservation of the steel in the pipe line does not come within the terms of Sections 144.010 and 144.020, RSMo 1949. It is therefore not subject to tax.

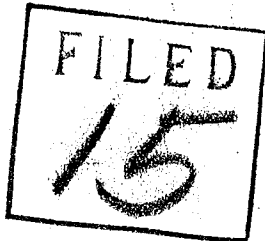
The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Yours very truly,

JOHN M. DALTON
Attorney General

JWF/bi

COUNTY COURT:
PUBLIC OFFICERS:



(1) A county court may not lawfully permit the usage of public property in the form of office space in a county courthouse for the conduct of a private commercial enterprise, either with or without a formal leasing arrangement; and (2) that a deputy clerk of the county court in a county of the fourth class is not prohibited from engaging in the business of preparing abstracts of titles in such counties.

February 23, 1955

Honorable Robert L. Carr
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Mr. Carr:

Reference is made to your request for an official opinion of this department reading as follows:

"The clerk of the county court of Washington County, a county of the fourth class, has appointed a deputy clerk under the provisions of Section 51.460, Revised Statutes of Missouri, 1949, and the deputy clerk performs the duties required of him in the office used by the county clerk. The deputy clerk is the owner of a set of abstract books, abstracting the deed records of Washington County, and is engaged in the abstract business.

"There is a small office in the county court house which adjoins the office of the clerk of the county court, and it is in this small office that the deputy clerk now operates his abstract business. The deputy clerk has a hired employee who does the actual work of abstracting and who occupies the small office which has been mentioned. The abstract business is publicly advertised under the name of the deputy clerk. There is no payment made from the deputy clerk to the county court for the use of the described office.

"It will be greatly appreciated if you will cause an opinion to be sent to this office dealing with the legality of the

Honorable Robert L. Carr

deputy clerk of the county court engaging in the abstract business for private gain. I should like for the opinion to specifically cover the legality of the county court allowing space in the county court house to be used for such a private enterprise by any person, whether or not he be the deputy clerk of the county court or other county official."

Your first question relates to the propriety of use of publicly owned office space in a courthouse by a person for private commercial purposes, with or without a leasing agreement. It is our thought that your question in this regard is answered by a previous official opinion of this department rendered under date of February 13, 1951, addressed to the Honorable James E. Curry, Prosecuting Attorney, Douglas County. Your attention is particularly directed to that portion of the opinion commencing on page five, together with paragraph two of the conclusion appended thereto. The reasoning in the opinion mentioned, insofar as it relates to the question you have proposed, was re-adopted by the present Attorney-General in a subsequent official opinion delivered under date of December 20, 1954, to the Honorable John Hosmer, Prosecuting Attorney-Elect of Webster County. Copies of the opinions referred to are enclosed herewith.

Your second question relates to the propriety of a deputy clerk of the county court engaging in the business of preparing abstracts within the county wherein he serves as such officer. It is noted that Washington County is one of the fourth class following the classification of counties adopted by the General Assembly and found Chapter 48, RSMo 1949. Consequently, authorization for the appointment of a deputy county clerk in such county appears under the provisions of Section 51.460, RSMo 1949.

We have examined the various statutes relating to the duties of county clerks and of their deputies and do not find any prohibition against such officials or deputies thereof engaging in the commercial activity of preparing abstracts of title. Parenthetically, we might observe that the only official against whom such a statutory prohibition does exist is the recorders of deeds of the various counties who, under the provisions of Section 59.200, RSMo 1949, are specifically prohibited from engaging in such activity. In the absence of such a prohibition, we conceive of no valid legal reason which would deprive such official of his right to engage in such activities. However, if

Honorable Robert L. Carr

in fact the conduct of such business interferred with the discharge of his official duties, it might very well serve as the basis for his removal from his position as deputy clerk. That, however, is a phase of the matter upon which this office does not purport to deliver any opinion.

CONCLUSION

In the premises, we are of the opinion:

(1) That a county court may not lawfully permit the usage of public property in the form of office space in a county courthouse for the conduct of a private commercial enterprise, either with or without a formal leasing arrangement; and,

(2) That a deputy clerk of the county court in a county of the fourth class is not prohibited from engaging in the business of preparing abstracts of titles in such counties.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

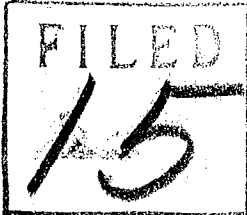
Very truly yours,

JOHN M. DALTON
Attorney General

Enclosures

Opinion to Honorable James E. Curry 2-13-51
Opinion to Honorable John Hosmer 12-20-54

AGRICULTURE:	: The commissioner of agriculture
COMMISSIONER OF AGRICULTURE:	: may fix the salary of the state
VETERINARIAN:	: veterinarian at an amount greater
OFFICERS:	: than the salary of the commis-
SERVICES AND SALARY.	: sioner of agriculture.
	:



February 28, 1955

Honorable L. C. Carpenter
 Commissioner
 Department of Agriculture
 State of Missouri
 Jefferson City, Missouri

Dear Mr. Carpenter:

Your letter bearing date of February 2, 1955,
 requesting an official opinion is as follows:

"You will find attached hereto a copy of
 a letter we received from a Committee ap-
 pointed by the President of the Missouri
 Veterinary Medical Association.

"This Committee is recommending an in-
 crease in the salary of Dr. L. A. Rosner,
 State Veterinarian. I am entirely in
 sympathy with their proposal regarding
 Dr. Rosner and his technical staff, that
 they should receive more remuneration.
 Of course this would be contingent upon
 availability of funds.

"There is another matter however on which
 I think it advisable for you to give us
 an interpretation, and that is, 'does the
 salary limitations established by law on
 the Commissioner's salary have any effect
 on the salaries of other staff members in
 the Department?'

"May I hasten to say that I certainly
 would be glad for Dr. Rosner to be draw-
 ing a salary greater than my own as Com-
 missioner, providing it is legal to do so
 and providing the funds are available.

Honorable E. C. Carpenter:

We shall take no further action upon this matter until we have been advised of your ruling."

The pay of the state veterinarian is provided for by Section 267.060, RSMo 1949. That section reads:

"The state veterinarian, deputy state veterinarians and livestock inspectors, shall receive salaries fixed by the state commissioner of agriculture and necessary traveling expenses in the discharge of official duties, payable out of the funds provided for the maintenance of the veterinary service. The state veterinarian, deputies and livestock inspectors shall each render an itemized account to the said commissioner of agriculture of all the traveling and incidental expenses incurred in working under this chapter. Said account or accounts shall be audited, and if found correct, shall be allowed as is now or may hereafter be provided by law."

(Emphasis ours.)

The pay of the commissioner of agriculture is provided for by Section 261.010, RSMo 1949. That section reads:

"There is hereby created a state department of agriculture, the main office of which shall be in Jefferson City in quarters provided by the division of public buildings. The governor, by and with the advice and consent of the senate, shall appoint a commissioner of agriculture who shall be a practical farmer, well versed in agricultural science and who shall serve at the pleasure of the governor. The commissioner shall be in charge of the state department of agriculture. He shall receive an annual salary of six thousand five hundred dollars, payable monthly, and traveling and other expenses necessarily incurred in the performance of his duties."

(Emphasis ours.)

Honorable L. C. Carpenter:

Your request inquires whether you may set the salary of the state veterinarian at a sum in excess of your salary.

We are unable to see anything prohibiting you from fixing the salary of the state veterinarian at a greater amount than your salary. Section 267.060, RSMo 1949, places within your sound discretion and good judgment the determination of the salary of the state veterinarian. There is no specific limitation on the amount that he may be paid. The limit is to be determined by you, keeping in mind the appropriation available for salary purposes. It is probable that the Legislature was aware that the services of a trained professional man might be difficult to get at a low salary, and for that reason left it to you to fix the salary at a reasonable amount sufficient to obtain the services of a competent state veterinarian.

CONCLUSION.

In the premises, therefore, it is the opinion of this office that the commissioner of agriculture may fix the salary of the state veterinarian at an amount greater than the salary of the commissioner of agriculture.

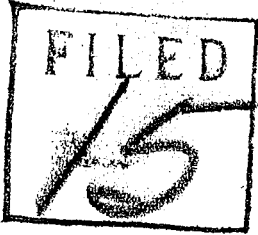
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

OFFICERS: Duties of prosecuting attorney and member of county library board of fourth class county are so repugnant or inconsistent as to render offices incompatible. One person cannot legally hold both offices at same time in same county.



March 21, 1955

Honorable Robert L. Carr
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion, which reads as follows:

"Washington County, Missouri, a county of the fourth class maintains a county library district established under the provisions of Section 182.010, Revised Statutes of Missouri, 1949.

"I am the Prosecuting Attorney of Washington County, having been elected in the general election of 1954.

"A vacancy in the county library board has occurred, by reason of the death of a former member. I have been asked if I will accept appointment to the county Library board, under the provisions of Section 182.050, Revised Statutes of Missouri, 1949, and I will greatly appreciate the opinion of your office as to the legality of my accepting such appointment."

We construe the inquiry to be whether or not there is such incompatibility between the duties of the prosecuting attorney of a fourth class county and those of a county library board member of the same county to legally prohibit one person from serving in both capacities at the same time.

Before attempting to answer the inquiry we must first determine whether the prosecuting attorney and library board member are public officers within the commonly accepted meaning

Honorable Robert L. Carr

of the terms "public office" and "public officer," as there can be no incompatibility such as to prohibit one person from holding the two positions at the same time unless they are public offices. We therefore find it necessary to refer to the statutes and any applicable court decisions in determining this preliminary question.

Chapter 56, RSMo 1949, is entitled "Circuit and Prosecuting Attorneys and County Counselors." Section 56.010 of said chapter provides for the election of a prosecuting attorney in each county of the state in the year 1880, and every two years thereafter. Said section gives the qualifications, and states that the person elected shall hold his office for two years and until his successor is elected, commissioned and qualified.

Various sections of Chapter 56 prescribe the official duties of the prosecuting attorney, but we shall only call attention to those relating to the inquiry of the opinion request.

Section 56.060 gives the general duties of the prosecuting attorney, and reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over three hundred thousand inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for

Honorable Robert L. Carr

their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 56.070 requires the prosecuting attorney to represent the county and state respectively in all civil and criminal matters in which the interests of either are involved. Said section reads as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate courts, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

From the provisions of the above-quoted sections we believe there is no doubt that it was the legislative intention to create a public office to be known as prosecuting attorney for each county in the state, and we find it unnecessary to cite further authorities to the effect that legally the prosecuting attorney is a public officer.

Honorable Robert L. Carr

The legislative intent does not appear so clearly from the statutes dealing with county library districts that the lawmakers intended to create a governing body of the district known as a county library board, and that the position held by each member of the board was to be a public office, as in the case of statutes relating to prosecuting attorneys. However, it is our contention that it was the legislative intent to create a public office known as county library board member. We believe that our contention is based upon sufficient legal authority, which we shall presently cite.

We call attention to Chapter 182, RSMo 1949, entitled "County and City Libraries."

Section 182.010 of said chapter prescribes the method of procedure in the organization of a county library district:

"When over one hundred taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as ' _____ county library district,' and asking that an annual tax be levied for the purpose herein specified, and shall specify in their petition a rate of taxation not to exceed two mills on the dollar; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital of such petition, including a description of such proposed county library district, and of its finding aforesaid, and shall order that the propositions of such petition be submitted to the voters of such proposed district at the next annual election to be held the first Tuesday in April, and that the clerk of the county court shall cause to be published the proposition or propositions of such petition, and said county clerk shall cause said proposition or propositions to be published in the manner, as near as may be, with the publication of 'the nominations to office,' as provided in section 120.580, RSMo 1949. Such order of court and such notice shall specify the name of the county and the rate of taxation mentioned

Honorable Robert L. Carr

in said petition, and such county clerk shall make and file in his office, return of service of such notice, and every voter within said proposed county library district may, in his proper district vote

"For establishing ____county library district'
or

'Against establishing ____county library district.'

and may vote

'For ____mills tax for a free county library.'

or

'Against ____mills tax for a free county library.'

provided, that in case the boundary limits of any city or town herein mentioned are not the same with the school district of such city or town, and such school district embraces territory outside the boundary limits of such city or town, then all voters, otherwise qualified and residing in such school district and outside the limits of such city or town, shall be eligible to vote on any proposition or matter of such library district, submitted to the voters at such election, and may cast a vote thereon, at the nearest and most convenient district schoolhouse within said county library district."

Section 182.020 requires the county court of a county in which a library district has been established to levy a tax for the county library fund, and reads as follows:

"And if from returns of such election, which shall be certified to the county court, the majority of all the votes cast on such propositions at such election shall be

'For establishing ____county library district.'

and for the tax for a free county library, the county court shall enter of record a brief recital of such returns and that there has been established

'____county library district.'

and thereafter such

Honorable Robert L. Carr

' _____ county library district'

shall be considered and held to be established, shall be a body corporate, and known as such, and the tax specified in such notice shall subject to provisions herein below of this section, be levied and collected, from year to year, in like manner with other taxes in the rural school districts of said county. The proceeds of such levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the treasury of the county and be known as the 'county library fund,' and be kept separate and apart from other moneys of such county, and disbursed by the county treasurer only upon the proper authenticated vouchers of the county library board herein mentioned, provided, that such taxes shall cease, in case the regular voters of any such district shall so determine by a majority vote at any annual election held therein, after petition, order of court, and notice of such election and of the purpose thereof, first having been made, filed and given, as in the case of establishing such county library district."

Section 182.050 provides for the appointment of county library boards and their removal, and we quote said section as follows:

"For the purpose of carrying into effect sections 182.010 to 182.130, in case a county library district is established and a free county library authorized, as provided in section 182.010, there shall be created a county library board which shall consist of five members, the county superintendent of schools and four other members to be appointed by the county court; said superintendent to serve as ex officio during his term of office, and the other members to be appointed for terms of four years each, except that the members of the first board shall be appointed for one, two, three and four years, respectively. The county court may remove any member from the board for misconduct or neglect of duty. Vacancies in the board occasioned by removal, resignations or otherwise

Honorable Robert L. Carr

shall be reported to the county court and be filled in like manner as original appointments. No member of the board shall receive compensation as such."

Section 182.060 gives the library board authority to organize, and is as follows:

"Said board, immediately after the appointment by the county court of the four members of the board, shall meet and organize by the election of one of their number as president and by the election of such other officers as they may deem necessary, shall make and adopt such bylaws, rules and regulations for their own guidance as may be expedient, not inconsistent with law, shall adopt such reasonable rules and regulations as shall render the use of said county library of the greatest benefit to the greatest number, shall, in case such library district establishes its own free county library, appoint a properly qualified librarian and necessary assistants, subject to the provisions of sections 182.010 to 182.130; and shall in general carry out the spirit and intent of sections 182.010 to 182.130 in establishing and maintaining such free county library and branches thereof."

Section 182.070 provides the power of a library district which is to be exercised through its board, and reads:

"Said '____ county library district' as such body corporate, by and through said county library board, shall have power to sue and be sued, to complain and defend, and to make and use a common seal, to purchase or lease grounds, to lease, occupy or to erect an appropriate building or buildings for the use of said county library and branches thereof, and to sell and convey real estate and personal property for and on behalf of the county library and branches thereof, to receive gifts of real and personal property for the use and benefit of such county library and branch libraries thereof, the

Honorable Robert L. Carr

same when accepted to be held and controlled by such board, according to the terms of the deed, gift, devise or bequest of such property."

Section 182,090 requires the county library board to file its annual report with the county court, and reads as follows:

"The said county library board shall make on or before the second Monday in June of each year, an annual report to the county court, stating the condition of their trust on the first of May of that year, a copy of which report shall, at the same time, be submitted to the Missouri state library. Said report shall be framed in accordance with the laws governing public libraries."

In the case of State ex rel. McKittrick v. Bode, 342 Mo. 162, Director Bode of the Missouri Conservation Commission was sued at the instance of the Attorney General in quo warranto proceedings to oust the director from office upon the ground that he had failed to comply with the legal requirement that officers were required to live within the state one whole year next preceding their appointment. It was claimed the director was not a public officer, but an employee of the Conservation Commission, and that he was exempt from the requirement as to residence within the state. The court was of the opinion that, although the director was appointed by the Commission, he was a public officer, and at l.c. 165-167, in discussing some of the characteristics and determining factors as to whether the director was a public officer, said:

"It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, and to be attained, depository of the power granted, and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all the cases. For instance, tenure, oath, bond, official designation, compensation and dignity of position may be considered. However, they are not conclusive. It should be noted that the

Honorable Robert L. Carr

courts and text writers agree that a delegation of some part of the sovereign power is an important matter to be considered. The question is considered at length in 46 Corpus Juris, page 924. In determining that a deputy sheriff was a public officer, we stated the rule as follows:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' (Mechem, Pub. Offices, 1.) The individual who is invested with the authority and is required to perform the duties is a public officer.

"The courts have undertaken to give definitions in many cases, and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law and discharges some of the functions of government he will be a public officer. (State v. Valle, 41 Mo. 30; People ex rel. v. Langdon, 40 Mich. 673; Rowland v. Mayor, 83 N.Y. 376; State ex rel. v. May, 106 Mo. 488.)

"Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the circuit court. After appointment and qualifications they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' (R. S. 1889, secs. 8181 and 8182.)

"The right, authority and duty are thus created by statute; he is invested with some portions of the sovereign functions of the

Honorable Robert L. Carr

government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers.

"It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the State, the authority is derived from the law, and the duties are exercised for the benefit of the public. Chief Justice MARSHALL defines a public office to be "a public charge or employment." (U. S. v. Maurice, 2 Brock, 96.) Whether a public employment constitutes the employee a public officer depends upon the source of the powers and the character of the duties * * *"

"It would not be possible for respondent to direct, regulate, guide, manage and superintend the matter of conservation without exercising some part of the sovereign power. Indeed, he is the chief administrator of all conservation matters. It follows that respondent, as director of conservation, is a public officer."

The above-quoted statutes prescribe the qualifications, appointment, terms and duties of members of the county library board, and in view of the provisions of said statutes, and also the definition and characteristics given of a public officer in the case of *State ex inf. McKittrick v. Bode*, supra, we feel that it would be difficult, if not impossible, to describe or classify a member of a county library board in any other manner than as a public officer. It is believed that the intent of the lawmakers in the enactment of statutes relating to county libraries is that members of such library boards were to be public officers, and we are unable to construe said sections in any other manner. Therefore, in view of the foregoing, it is our thought that members of county library boards are public officers within the commonly accepted meaning of the terms, "public office," and "public officer," and we are unable to construe said sections in any other manner.

Honorable Robert L. Carr

We have determined that prosecuting attorneys and county library board members are public officers, and the question remaining for our final determination is whether or not the duties of the two officers in a fourth class county are so inconsistent or repugnant to each other as to render them incompatible, so that one person cannot legally hold both at the same time in the same county.

Compatibility and incompatibility of offices is a common-law doctrine which was discussed in the leading Missouri case of *State ex rel. Walker v. Bus*, 135 Mo. 325, l.c. 338, where the court said:

"V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in *People ex rel. v. Green*, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be

Honorable Robert L. Carr

landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

It will be noticed that Section 56.070, supra, requires the prosecuting attorney to represent his county in all civil, criminal, or other matters in which the interests of the county are involved. Section 56.100, supra, also requires him to give his free legal opinion upon questions of law when requested by the county court of his county. From what has already been stated, we believe that the affairs of a county library district and its board are matters in which the interests of the county are vitally concerned, and which might require the services of the prosecuting attorney of that county. In this connection we desire to call attention to at least a few instances regarding county library boards when the prosecutor's services are needed and when the furnishing of legal advice or other assistance becomes the official duty of the prosecuting attorney.

It will be recalled that Section 182.090, supra, requires the library board to file its annual report with the county court, giving the condition of the trust of said board. In the event the court requires the legal opinion of the prosecuting attorney upon any matter shown in the report, or pertaining to same, it will be the prosecuting attorney's duty to so advise the court.

Again, if the library board has misappropriated any part of the tax funds collected for the support of the library, it would be the official duty of the prosecuting attorney to institute criminal proceedings against the offending board members, as well as to institute civil proceedings against such board members for the recovery of the funds for the benefit of the library district.

Should any board member be found guilty of misconduct in office and the county court should attempt to remove him under the provisions of Section 182.050, supra, and such board member would refuse to vacate the office, it would then be the duty of the prosecuting attorney to bring quo warranto proceedings against such board member to oust him from office.

In all such instances the county's interests would be involved, and we repeat that the prosecuting attorney's services

Honorable Robert L. Carr

would be needed to safeguard the county's interests. We feel that such instances are not extreme examples, but rather those which might be reasonably expected to happen during the term of office of any prosecuting attorney.

In view of the foregoing, it is our thought that the duties of prosecuting attorney and those of a member of a county library board of a fourth class county are so repugnant or inconsistent to each other that said offices are incompatible, and one person cannot legally hold both offices at the same time in the same county.

CONCLUSION

It is the opinion of this department that the duties of prosecuting attorney and those of a member of a county library board of a fourth class county are so repugnant or inconsistent as to render said offices incompatible. One person cannot legally hold both offices at the same time in the same county.

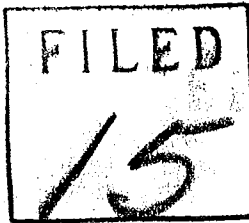
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:ma:ml

ANIMALS: : Captive minks kept by a private in-
PERSONAL PROPERTY: : dividual for commercial purposes are
TAXATION: : taxable property.
CONSERVATION COMMISSION:.....
WILDLIFE:



March 22, 1955

Honorable John R. Caslavka
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Mr. Caslavka:

Your letter of March 15, 1955, requesting an
opinion of this office, reads, in part, as follows:

"A certain individual in Dade County,
Missouri, for the past several years
has engaged in the occupation of rear-
ing mink for commercial purposes. When
the tax assessor attempted to place them
on the tax list he objected stating that
the title to these wild life was vested
in the State of Missouri under and by
virtue of Section 252.030 VAMS, 1949.
The position of this office is that even
though the title to all wild life may be
vested in the State of Missouri, and cer-
tainly the rearing of these mink is under
the supervision and control of the State
Conservation Commission, they are still
subject to a tangible personal property
tax in the county in which the individual
resides."

Tax liability on owners of real and tangible per-
sonal property is established by Section 137.075, RSMo
1949. That section provides:

"Every person owning or holding real
property or tangible personal property
on the first day of January including
all such property purchased on that day,
shall be liable for taxes thereon during
the same calendar year."

Section 252.030, RSMo 1949, provides:

Honorable John R. Caslavka:

"The ownership of and title to all wild life of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri. Any person who fails to comply with or who violates this law or any such rules and regulations shall not acquire or enforce any title, ownership or possessory right in any such wild life; and any person who pursues, takes, kills, possesses or disposes of any such wild life or attempts to do so, shall be deemed to consent that the title of said wild life shall be and remain in the state of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof."

Formerly there was no property right in wild animals until captured. Wild animals became the property of the person capturing and taming them, and were the property of the captor so long as he kept control of them, even though they were never tamed. State vs. Weber, 205 Mo. 36, 45, 46, 102 S.W. 955.

Section 252.030 does not mean that a private person can have no property rights in wildlife. In our view, the placing of title of wildlife in the State was for the purpose of regulation of the taking, and conservation, of wild animals.

The implication of Section 252.030 is that a person lawfully acquiring possession of wildlife becomes the owner thereof, subject only to the superior right of the State to make regulations concerning such wildlife after lawful obtention of possession by a private person. Thus, it was stated in State vs. Taylor, 358 Mo. 279, 214 S.W. (2d) 34, 36:

"We agree with appellant that 'title to fish reduced to one's possession by lawful means is released by the State to the taker,' * * *."

And in State vs. Freeland, 300 S.W. 675, 676, it is said:

Honorable John R. Caslavka:

"* * * It is plain from the statutes that the state has asserted title to fish for the public good, releasing title, however, at certain and proper designated seasons to such of the public as through effort and skill and by lawful means and manner reduce the fish to actual possession, * * *."

We note that it is lawful, upon compliance with certain regulations, to hold wildlife in captivity for purposes of propagation. This is permitted by Section 51, Wildlife Code of Missouri (January 1, 1955 Revision). That section reads:

"Wildlife may be propagated and held in captivity by the holder of a wildlife breeder's permit, as provided herein. Such permits may be granted after satisfactory proof by the applicant that all such wildlife was secured from a source other than the wild stock in this state, and that the applicant is equipped to confine such wildlife for public safety and to prevent wildlife of the state from becoming a part of the enterprise; but such proof may be waived in the renewal of any such permits. Wildlife so propagated and held may be used, sold, given away, transported or shipped at any time, but the same shall be accompanied by a written statement by the permittee giving his permit number and showing truly the kind and number of each species sold, given away, transported or shipped, the name and address of the recipient, and that as to the same he has fully complied with this code. Wildlife propagated in captivity or transported into this state may be liberated to the wild only under the specific permission and supervision of the Commission. The operation of any such enterprise in violation of this code or in any manner as a

Honorable John R. Caslavka:

cloak or guise to nullify or make difficult the enforcement of this code shall be cause for the suspension or revocation of such permit."

The above section, promulgated by the Conservation Commission by authority of Article IV, Section 45, Constitution of Missouri, 1945, giving to authorized holders of wildlife the right to use, sell, give away, transport, or ship the wildlife held by them, grants to such authorized holders complete ownership against the world, excepting the right of the State to make reasonable regulations concerning such wildlife.

CONCLUSION

In the premises, therefore, it is the opinion of this office that captive minks kept by a private individual for commercial purposes are taxable property.

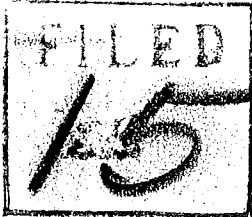
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

ANIMALS: : Householders within an incorporated city of the
STOCK LAW: : fourth class, which city has a stock law, are
ELECTIONS: : qualified to petition the county court for a
PETITIONERS: : county-wide election on the question of restraint
: of domestic animals, under Section 270.090, RSMo
: 1949.
.....



April 5, 1955

Honorable Robert L. Carr
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Mr. Carr:

Your letter of March 18, 1955, requesting an
opinion of this office reads:

"The Presiding Judge of the County
Court of Washington County has direct-
ed me to request the opinion of your
office as to whether residents of an
incorporated city of the fourth class
within this County, which said city al-
ready has a stock law in effect, are
qualified petitioners to cause the
County Court to submit to the qualified
voters of the entire County the question
of enforcing the provisions of Chapter
270 of the Revised Statutes of Missouri,
1949.

"Section 270.090, Revised Statutes of
Missouri, 1949, on this point, has been
questioned by the Court, and I have been
specifically directed to request the
opinion of your office of this point."

Section 270.090, RSMo 1949, provides:

"The county court of any county in this
state, upon the petition of one hundred
householders of such county, at a general
election, and may upon such petition of
one hundred householders, at a special
election, called for that purpose, cause
to be submitted to the qualified voters

Honorable Robert L. Carr:

of such county the question of enforcing, in such county, the provisions of this chapter. Said petitioners shall state in their petition to said court what species of the domestic animals enumerated in section 270.010 they desire the provisions of this chapter enforced against, and may include one or more of said animals in said petition; and said court shall cause notice to be given that such vote will be taken, by publishing notice of the same in a newspaper published in such county, for three weeks consecutively, the last insertion of which shall be at least ten days before the day of such election, and by posting up printed notices thereof at three of the most public places in each township in such county, at least twenty days before said election; said notices shall state what species of domestic animals on which the vote will be taken, to enforce the provisions of this chapter against running at large in such county, which shall be the same as petitioned for to said court."

The above statute provides for an election upon petition "of one hundred householders of such county", submitting to the "qualified voters of such county" the question of restraint of domestic animals. The statute creates no direct exclusion of city householders from the qualified petitioners, and we can find no basis upon which an implied exclusion can be erected. If it had been the intention of the Legislature to exclude householders of a city wherein a stock law exists, it is believed that the Legislature would have so provided.

Our conclusion is substantiated by the case of State ex rel. Sturgeon vs. Bishop, 195 Mo. App. 30, 189 S.W. 593. In that case, certain of the townships had adopted the stock law, and the question was raised whether the voters of such townships were eligible to vote in a county-wide election, and whether householders in such townships were eligible petitioners. The court held that persons in townships previously adopting the stock law, were, nevertheless, eligible to participate in a county-wide election on the same question, saying, l.c. 33, 34:

Honorable Robert L. Carr:

"* * * The citizens of the townships having adopted the stock law are yet interested in the question of its adoption in the whole county, and, because of having themselves adopted it, are none the less qualified to vote at the general election. The fact that the voters of certain townships are forced to accept less than county-wide restraint of animals from running at large should not deprive them of the right to aid in obtaining the greater benefit when it is possible."

* * * * *

"* * * Upon the record before us it is conceded that the petition and all the proceedings are regular if the householders of the townships having adopted the law are qualified to participate therein. As the matter now stands before us it appears that all matters in which the county court may exercise its discretion have been disposed of and that the only duty left to be performed is that of proceeding with the election.
* * *."

And, in *Weaver et al. vs. Bryan*, 225 Mo. App. 385, 35 S.W.(2d) 639, it was said, 1.c. 640:

"We shall now consider plaintiffs' objections to the legality of this election in inverse order. Objection No. 3 is based on the contention that, since Beaver Dam township already had adopted the stock law, and it was then in force in that township, it could not be included and coupled with the other three townships in an election of this kind. This court has ruled against that contention in *State ex rel. v. Bishop*, 195 Mo. App. 30, 189 S.W. 593, and we still hold to that position. This holding also disposes adversely to appellants of a minor contention by them that, since there are two incorporated towns in the territory which have ordinances restraining domestic animals from running at large, the voters of these towns could not vote at this election.

Honorable Robert L. Carr:

Section 270.090, supra, requires the petition be signed by not less than one hundred householders. It should be noted that "resident" and "householder" are not necessarily synonymous terms. In *State vs. Pemberton*, 235 Mo. App. 1128, 151 S.W. (2d) 111, the court, in construing a statute requiring an election on the question of imposing a dog tax, upon petition of not less than one hundred householders, said, *l.c.* 115:

"The word 'householder' must be given its legal interpretation and effect. In other words, what is the natural and obvious import of the word or what did the legislature intend by the qualification expressed by the word?

"The natural and obvious import of the word 'householder' is that of head of the family. Words and Phrases, Second Series, Vol. 2, p. 919, says of the word 'household' that 'it embraces a household composed of parents, children, or domestics; in short, every collective body of persons living together within one curtilage subsisting in common and directing their attention to a common object. *Robbins v. Bangor Ry. & Electric Co.*, 100 Me. 496, 62 A. 136, 141, 1 L.R.A. (N.S.) 963 (citing 3 Words and Phrases (First Series), p. 2673, and cases cited).' (See 19 Words and Phrases, Permanent Edition, p. 702)

"The common and generally accepted meaning of the term 'householder' embraces the idea of anyone, man or woman, who maintains a home in the community. It follows that there may be a number of voters in a home and only one householder."

CONCLUSION

It is, therefore, the opinion of this office that householders within an incorporated city of the fourth class, which city has a stock law, are qualified to petition

Honorable Robert L. Carr:

the county court for a county-wide election on the question of restraint of domestic animals, under Section 270.090, RSMo 1949.

The foregoing, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:irk

MILITARY PERSONNEL
RECORDERS OF DEEDS:

Holder of discharge from armed forces of
United States may have the same recorded
in any county of this state.

April 18, 1955



Honorable Roy L. Carver
State Service Officer
State Office Building
P. O. Drawer 147
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"On several occasions it has been called
to the attention of this Division that
veterans of War time Service have re-
quested their discharges be recorded by
the Recorder of Deeds of certain coun-
ties, and some of the Recorders have re-
fused to record the discharge in their
county because of the fact the veteran
was not a resident of that County.
Several of these cases are where the
veteran lives very close to the county
line and usually does a lot of his busi-
ness in the county where he has his dis-
charge recorded.

"Our question is: Can the Recorder of
Deeds of a county refuse to record a dis-
charge of a veteran when he is a resident
of another county in the State of Missouri."

Your question is answered by the provisions of Section
59.480, RSMo 1949, which section reads as follows:

"Any person who is the holder of a dis-
charge from the armed forces of the
United States may demand that said dis-
charge be recorded by the recorder of

Honorable Roy L. Carver

deeds of any county in this state, including the recorder of deeds of the city of St. Louis, and it shall be the duty of said recorder of deeds to record said discharge without any fee or compensation therefor."

The language of the statute is clear in requiring recorders of deeds to accept for recordation discharges proffered by the holders thereof and that without regard to the county in Missouri wherein such holder may reside. In the absence of ambiguity, no occasion for construction of a statute arises and the plain wording thereof is to be followed. The rule with respect thereto is stated in the following language found in *Steggall v. Morris*, 363 Mo. 1224, 258 S. W. (2d) 577, 1. c. 582:

"In *State ex inf. Rice ex rel. Allman v. Hawk*, 360 Mo. 490, 228 S. W. 2d 785, loc. cit. 789 (8,9), this court stated the rule thus: 'The language of the statute is clear and unambiguous, and we have no right to read into it an intent which is contrary to the legislative intent made evident by the phraseology employed.'"

CONCLUSION

In the premises, we are of the opinion that a resident of Missouri who is the holder of a discharge from the armed forces of the United States may demand that such discharge be recorded by the recorder of deeds of any county in this state and that such recorder of deeds has no right to refuse such recordation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

WFB:DA

JOHN M. DALTON
Attorney General

AGRICULTURE:
EGG DEALERS:
LICENSES:

The Commissioner of Agriculture may not delay the licensing of egg retailers, dealers and processors to a date beyond the date when such person, firms or corporations are required to obtain licenses as provided by existing law.



June 10, 1955

Honorable L. C. Carpenter
Commissioner of Agriculture
State of Missouri
Jefferson City, Missouri

Dear Mr. Carpenter:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"With the passage of House Bill 177 and said Bill being signed by the Governor on recent date, we have a problem concerning the licensing of egg retailers, egg dealers and egg processors.

"Our present egg licenses under existing laws expire on June 30, 1955. This Law, of course, will continue in effect until August 29, 1955, at which time House Bill 177 will become effective. It is our desire to not collect the licenses under the existing laws starting July 1, 1955, but rather to start about the first of July, 1955, sending out applications for licenses to be effective August 29, 1955, under the new Law.

"We would like an opinion at your earliest convenience as to whether or not it will be permissible for us to delay the licensing on July 1, 1955, to August 29, 1955."

The present existing law relating to the licensing of persons, firms or corporations who buy, sell, trade or traffic in eggs in this state is found in Chapter 196, RSMo. 1949.

Section 196.335, RSMo. 1949, provides, in part, as follows:

"1. It shall be unlawful for any person, firm or corporation to buy, sell, trade or

Hon. L. C. Carpenter

traffic in eggs in this state without a license with the following exceptions:

* * * * *

"2. Each person firm or corporation engaged in buying, selling, trading or trafficking in eggs, except those listed under subdivisions (1), (2), (3), (4) and (5) above, shall obtain an annual license for each separate place of business from the commissioner of agriculture. The following types of licenses shall be issued:

* * * * *

"4. All licenses shall be conspicuously posted in the place of business to which it applies. The license year shall be twelve months or any fraction thereof beginning July first and ending June thirtieth.

* * * * *

Section 196.350, RSMo 1949, provides that all license fees shall be paid to the Director of Revenue and deposited with the State Treasurer to the credit of the Agricultural Fees Fund.

Section 196.355, supra, provides that the Commissioner of Agriculture shall enforce the foregoing provisions. The 68th General Assembly, by the enactment of House Bill 177, has repealed the above noted 1949 provisions and substituted in lieu thereof several new sections. In view of the fact that the provisions of House Bill 177 are substantially similar to the above noted provisions with the exception that the annual license fees have been increased, we do not deem it necessary for the purpose of this opinion to set forth the provisions of House Bill 177 in full.

House Bill 177 does not include an emergency clause and therefore said bill will not become effective until 90 days after the adjournment of the session, which latter date was May 31, 1955. Sec. 29, Art. III, Constitution of Missouri, 1945.

Hon. L. C. Carpenter

You inquire whether the licensing of egg retailers, dealers and processors required by the existing law may be delayed until August 29, 1955, when the provisions of House Bill 177 become effective, we believe the answer must be in the negative.

As noted above, Section 196.335, supra, makes it unlawful for any person, firm, or corporation to buy, sell, trade or traffic in eggs without a license. Said provisions are still in effect, and will be until the effective date of House Bill 177.

We are of the opinion that the Commissioner of Agriculture, who is charged with the enforcement of the egg licensing provisions, may not authorize a violation of the terms of Section 196.335, supra, by refusing to issue a license on or before July 1, 1955, or to otherwise suspend the operation of said provisions and the licensing of egg retailers, dealers and processors should be proceeded with as provided by law.

CONCLUSION

Therefore, it is the opinion of this office that the Commissioner of Agriculture may not delay the licensing of egg retailers, dealers and processors to a date beyond the date when such person, firms or corporations are required to obtain licenses as provided by existing law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

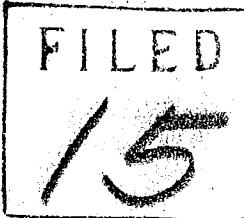
DDG:mw

John M. Dalton
Attorney General

JAIL BREAKING:

CITY ORDINANCE:

A person who escapes from a city jail wherein he was confined after conviction for violation of a city ordinance, may not be prosecuted under Sections 557.380 or 557.390 RSMo 1949.



June 17, 1955

Honorable Larry J. Casey
Assistant Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Potosi, a City of the fourth class, maintains its own City Jail for the detention of persons convicted of violating City Ordinances. One such prisoner, convicted of the violation of an Ordinance, has effected his escape from the jail.

"The President of the Board of Aldermen and the City Marshal have requested that they be allowed to sign a complaint, through this office, charging the escaped prisoner with breaking jail. A question thus arises, under Chapter 557 of the Missouri Revised Statutes, 1949, and more particularly Sections 557.380 and 557.390, as to whether these sections, or any other statutes are applicable to escape from a City Jail."

Section 557.380, RSMo 1949, to which you first refer, reads:

"If any person confined in any county jail upon conviction for any criminal offense, or held in custody going to such jail, shall break such prison or custody, and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or in a county jail not less than six months, to commence at the expiration of the original term of imprisonment."

Honorable Larry J. Casey

In regard to the above we direct attention to the case of State v. Owens, 268 Mo. 481. The fact situation in that case is thus stated in the opinion (l.c. 482):

"Under an indictment attempting to charge the defendant with a violation of section 4381, Revised Statutes 1909, defendant was tried in the circuit court of Howell County, found guilty and his punishment assessed at two years in the penitentiary. Defendant has duly perfected an appeal to this court.

"Due to the conclusion which we have reached in this case, it will only be necessary to consider the indictment, which, omitting caption and formal parts, was as follows:

"The grand jurors for the State of Missouri, summoned from the body of Howell County, impaneled, sworn and charged to inquire within and for the body of the county of Howell, now here in court, upon their oath present and charge that at the March term, 1915, at and in the county of Howell and State of Missouri, one Ted Owens was then and there duly convicted and found guilty by a jury, of the offense of felonious assault and his punishment fixed at a fine of one hundred dollars, in default and failure to pay which in accordance with said conviction, he, the said Ted Owens, was by the said court duly committed to the county jail of said county, and it was ordered by the court that he, the said Ted Owens, be placed in custody of the street commissioner of the city of West Plains, a city of the third class, and required to work on the streets of the said city, until said fine and costs of said action be paid and he be discharged by due course of law; and that in accordance with the orders of said court the said Ted Owens was so committed to the custody of one N. F. Webster who was then and there duly qualified and acting street commissioner and guard, to be worked as a prisoner on the streets of the city of West Plains, as aforesaid, and that afterwards, to-wit, on the day of May, 1915, at and in the said city of West Plains, in the county of Howell and State of Missouri, the said Ted Owens, while then and there in the custody of the said N. F. Webster, street commissioner and guard aforesaid, did then and there unlawfully, willfully and felon-

Honorable Larry J. Casey

iously break custody, run away and escape from the said N. F. Webster, street commissioner and guard aforesaid, and that the said N. F. Webster was then and there duly authorized and empowered to act and was then and there acting as such officer, street commissioner and guard under and by authority of law; and that the said Ted Owens did then and there unlawfully and feloniously break away, run and escape from the custody of the said N. F. Webster, street commissioner, officer and guard as aforesaid; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State."

At l.c. 484 the court stated its conclusion thus:

"Section 4381, Revised Statutes 1909, upon which this prosecution was based, reads as follows:

"'If any person confined in any county jail upon conviction for any criminal offense, or held in custody going to such jail, shall break such prison or custody, and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or in a county jail not less than six months, to commence at the expiration of the original term of imprisonment.'"

"It will be noted that the above section limits the violation to a breaking and escaping from a 'county jail' or from 'custody going to jail,' and the statute in no manner undertakes to prescribe a penalty for escaping from a street commissioner into whose custody he is placed for the purpose of being worked upon the streets, as charged in the present indictment. Our attention has not been called to a statute nor have we been able to find one making the acts charged in the present indictment a criminal offense. As much is virtually conceded by the brief of the learned Attorney-General. This being true, we need not determine whether the information sufficiently charges a lawful custody in said street commissioner.

"It is a well established rule that criminal statutes must be strictly construed. Very appropriate to the discussion here is the language used by the Kansas Supreme Court in discussing a section (182) of the Kansas Code which appears to be almost an exact duplicate of Section 4381, Revised Statutes

Honorable Larry J. Casey

1909. The court said:

"Section 182 has reference to persons confined in a county jail or held in custody going to such jail. As a rule, penal statutes must be strictly construed, and they cannot be extended beyond the grammatical and natural meaning of their terms, upon the plea of failure of justice. (Remington v. State, 1 Ore. 281; State v. Lovell, 23 Iowa, 304; Gibson v. State, 38 Ga. 571.)"

"We are not at liberty to interpolate into the statute "city prison" nor can we judicially determine that a "city prison" is a "county jail." It is therefore our opinion that the matters charged in the information do not constitute any offense within the statute. The omission is one for which the Legislature is responsible. It is probably a casus omissus, which the Legislature may, but the court cannot, supply." (State v. Chapman, 33 Kan. 134.)

"The judgment is reversed and the defendant discharged."

It appears to us that the situation of the defendant in your case is far stronger than that of the defendant--appellant in the Owens case, supra. In the Owens case the defendant had been convicted of a graded felony and was regularly confined in the county jail. In your case the conviction was for violation of a city ordinance and confinement was in the city jail. Since the court held that in the Owens case prosecution could not be had under what is now Section 557.380, supra, which is identical in wording with Section 4381, RSMo 1909, I do not believe that prosecution will lie in your situation.

You next ask about Section 557.390, RSMo 1949. We have previously construed this section in an opinion rendered September 6, 1951, to Honorable Weldon W. Moore, Prosecuting Attorney of Texas County, a copy of which opinion is enclosed. You will note that the fact situation in the Moore opinion is very similar to your own, and that the opinion holds that prosecution under Section 557.390, supra, will not lie.

CONCLUSION

It is the opinion of this department that a person who escapes from a city jail wherein he was confined after conviction

Honorable Larry J. Casey

for violation of a city ordinance, may not be prosecuted under Section 557.380 or 557.390, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

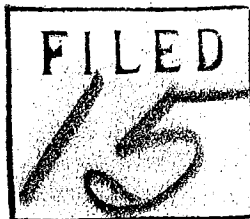
Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ld

enc. (1)

JAILS:
INSOLVENTS:
DISCHARGES:



A person legally confined in the county jail for nonpayment of costs properly assessed against him in a criminal proceeding is not entitled to discharge as an insolvent, except upon strict compliance with the procedure set forth in Chapter 551 RSMo 1949.

June 22, 1955

Honorable John R. Caslavka
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"On the 23rd day of October, 1954, one George McGeehee entered his plea of guilty to the charge of careless and reckless driving and was by the Circuit Court of Dade County, Missouri, sentenced to 90 days in the County Jail and then and there paroled by the Court conditioned upon his good behavior in leading the life of a law abiding citizen. At the same time the cost in this action, amounting to some \$111.45 was assessed against the defendant and he was given 60 days to pay the same.

"On the 14th day of March, 1955, and the defendant having paid \$3.00 on the cost so assessed against him under order of the court, an execution was issued against the defendant for nonpayment of cost and he was then and there committed to the county jail of Dade County, Missouri, the sheriff's return being dated the 31st day of March, 1954.

"During a part of the time the defendant was in jail he worked on the county buildings under order of the county court and was on the 5th day of May, 1955, discharged from the county jail by the sheriff of this county.

"Since that time Mr. McGeehee has indicated that he was held in jail for non-payment of fine and cost some 15 days in excess of the time provided for by the laws of the State of Missouri, Apparently Mr. McGeehee is basing this

Honorable John R. Caslavka

on Section 221.180 Revised Statutes of Missouri, 1949, which provides in Section 4 that 'no prisoner shall be required to work over 20 days for the cost assessed against him.'

"This office is having a difficult time reconciling Section 221.180 Revised Statutes of Missouri, 1949 and Section 551.010 Revised Statutes of Missouri, 1949, and inasmuch as Mr. McGeehee has filed a claim with the county court for loss of income during the time he was incarcerated in excess of his 20 days for the non-payment of fine and cost. Your very earliest opinion on this question would be appreciated."

Chapter 551, RSMo 1949, to which you refer, is entitled "relief of insolvents confined on criminal process." Section 551.010, RSMo 1949, reads:

"Any person detained in prison for the nonpayment of any fine or costs on account of any criminal proceeding may be ordered to be discharged from such imprisonment, by the court or by the judge of the court having criminal jurisdiction for the county in which he may be, or by the clerk of said court in vacation, after being imprisoned one day for every two dollars of such fine and costs, or after having endured twenty days' actual imprisonment for the nonpayment of costs, if he be unable to pay the same."

Subsequent sections elaborate upon the duties imposed upon the prisoner petitioner, and others, if the petitioner seeks to take advantage of and obtain a discharge under Chapter 551.

In regard to the above, we direct attention to the case of Ex parte Secrest, 32 S.W.(2d) 1085. At l.c. 1087 of its opinion in that case the court stated:

"(1) The statute authorizing petitioner's commitment is section 4070, R.S.1919, as follows: 'Whenever any defendant shall, on a conviction, be sentenced to imprisonment in a county jail, or to pay a fine, he shall be imprisoned until the sentence is fully complied with and all costs

Honorable John R. Caslavka

paid, unless he be sooner discharged in the manner hereinafter provided.'

"This statute, within its scope, applies alike to misdemeanors and felonies. It is a part and parcel of every sentence to a fine (Ex parte Parker, 106 Mo. 551, 555, 17 S.W. 658), and the judgment was in substantial compliance therewith. The manner in which defendant could 'be sooner discharged' is thus set forth in the sections immediately following:

"Section 4071: 'When any person is held in custody or imprisoned for a fine imposed for a criminal offense, as specified in the last section, the court in which the cause was tried, or the judge thereof in vacation, on the petition of the prisoner for that purpose, shall sentence him to imprisonment for a limited time, in lieu of the fine; and at the expiration of such time the prisoner shall be discharged on the payment of costs, or obtaining his discharge in the manner in the next sections provided.'

"Section 4072: 'Whenever any person shall be detained for the costs of a criminal prosecution, he shall, after having endured twenty days' imprisonment in the county jail for the nonpayment of such costs, be permitted to take the benefit of the laws for the relief of insolvent persons confined on criminal process, on making application for that purpose, and conforming to the provisions of such law.'

"(2-4) Section 4071, supra, provides a method, and we are advised of no other, by which a defendant so committed may discharge the fine apart from the costs assessed against him by the same judgment. He may petition the court in which the cause was tried, or the judge thereof in vacation, to 'sentence him to imprisonment for a limited time, in lieu of the fine.' When such prison sentence is served, he is entitled to be discharged on payment of costs or obtaining his discharge under Section 4072 and the act for the relief of insolvents confined on criminal process. To authorize a discharge, there must be a strict compliance with the statutes prescribing the methods by which it may be

Honorable John R. Caslavka

obtained. 15 G. J. Sec. 861, p. 344; Ex parte Parker, 106 Mo. 551, 17 S.W. 658; In re Curley, 34 Iowa, 184; In re Dobson, 37 Neb. 449, 55 N.W. 1071. Having followed a way of his own choosing not authorized by statute, petitioner is not entitled to be discharged."

It will be noted that the above states that to authorize a discharge because of insolvency, the prisoner must strictly comply with the procedure set forth by statute, which is now found in Chapter 551, supra. However, in your letter to us, you do not state that the prisoner made any attempt whatever to comply with Chapter 551. We shall, therefore, consider that he did not do so, and for this reason Chapter 551 has no application whatever in this situation.

Section 221.180, RSMo 1949, to which you refer, reads as follows:

"1. The county courts in this state may, in their discretion, cause all persons who have been convicted and sentenced by a court of competent jurisdiction, for crime, the punishment of which is defined by law to be a fine or by imprisonment in the county jail for any length of time, or by both such fine and imprisonment, or by fine and imprisonment until such fine be paid, to be put to work and perform labor on the public roads and highways, turnpikes, or other public works or buildings of said county, or of any town or city therein, for such purposes as they may deem necessary.

"2. Whenever there shall be ten or more such persons confined in the jail, it shall be obligatory for the county court to cause all such persons, except females and those physically incapable of manual labor, to be worked.

"3. The county courts may, in their discretion, procure a lot of ground by purchase or renting, at such place and of such size as they may select, and may authorize the sheriff to buy perch rock to be delivered on said lot; and the sheriff shall have or cause all such prisoners as may be directed by the county court to work out the full number of days for which they have been sentenced, at breaking such rock or at working upon such public roads and highways, turnpikes or other public works or buildings as may have

been designated.

"4. If the punishment is by fine and the fine and costs be not paid, then for every dollar of said judgment, including costs, the prisoner shall work one day, and it shall be deemed a part of the judgment and sentence of the court that such prisoner may be worked as herein provided. No prisoner shall be required to work over twenty days for the costs assessed against him."

You will note that the last sentence of the above holds that the prisoner shall not be required to work over twenty days for the "costs" assessed against him. You do not state how long the prisoner in your case was worked, but we note that you do not state that McGeehee claims to have been worked over twenty days. He claims instead that he was held in jail some fifteen days longer than he should have been. It would appear, therefore, that he did work approximately twenty days, at the end of which time he thought he should be discharged, but that instead of being discharged he was held in jail for some additional fifteen days. The prisoner would have been entitled to discharge after twenty days' imprisonment, according to Section 551.010, supra, if he had complied with the provisions set forth in Chapter 551, which, as we noted, he did not do.

As we noted above, Section 221.180, supra, held only that a prisoner could not be worked over twenty days for the payment of costs, but it does not state that having worked twenty days he shall be discharged.

Section 546.850 RSMo 1949, reads:

"Whenever any person shall be detained for the costs of a criminal prosecution, he shall, after having endured twenty days' imprisonment in the county jail for the nonpayment of such costs, be permitted to take the benefit of the laws for the relief of insolvent persons confined on criminal process, on making application for that purpose, and conforming to the provisions of such law."

We have noted above that the prisoner did not "take the benefit of the law for the relief of insolvent persons", which is Chapter 551, and so Section 546.850, supra, does not apply to this prisoner, and Section 546.830, supra, did apply to him.

Honorable John R. Caslavka

CONCLUSION

It is the opinion of this department that a person legally confined in a county jail for nonpayment of costs properly assessed against him in a criminal proceeding is not entitled to discharge as an insolvent, except upon strict compliance with the procedure set forth in Chapter 551 RSMo 1949.

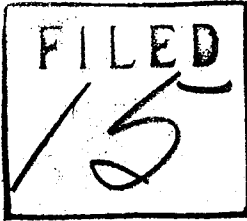
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

SOIL CONSERVATION:
WATERSHED PROTECTION AND
FLOOD PREVENTION ACT:



A soil conservation district is a "local organization" within the meaning of Public Law 566; the supervisors of a soil conservation district have authority to carry out, maintain, and operate "works of improvement" of that portion of a small watershed which lies within the soil conservation district of which they are supervisors, under the watershed protection and flood prevention act; that the supervisors are authorized to expend the funds of the district, and to use funds that are made available to them from federal, state, or local sources, both public and private, in carrying out the provisions of the Watershed Protection and Flood Prevention Act as set forth in Public Law 566.

July 18, 1955

Honorable L. C. Carpenter
Chairman
Missouri Watershed Protection and
Flood Prevention Committee
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

I am in receipt of your letter of June 21, 1955, in which you request my opinion on the questions raised in a letter dated June 21, 1955, addressed to you, written by C. C. Bruce, State Conservationist, which letter is enclosed in your letter to us. The letter written by Mr. Bruce is as follows:

"As chairman of the Missouri Watershed Protection and Flood Prevention Committee, you are aware that Public Law 566 (Watershed Protection and Flood Prevention Act) was passed by the 83rd Congress and approved by President Eisenhower. A copy of the Act is attached for your information.

"Since the passage of the Act, there has been considerable discussion centered around the authority of soil conservation districts to qualify as a 'local organization' as defined in the Act.

"It is necessary to the effective administration of the Watershed Protection and Flood Prevention Act that we have the Attorney General's opinion interpreting the soil conservation district law (Senate Bill 80) with respect to whether soil conservation districts in Missouri

Honorable L. C. Carpenter

qualify as a 'local organization' for sponsoring watershed projects in accordance with the provisions of the Act. More specifically we need an opinion as to the authority of soil conservation districts organized under the soil conservation district law of Missouri to carry out, maintain, and operate 'works of improvement' under the Watershed Protection and Flood Prevention Act. Also an opinion is needed as to the authority of soil conservation districts in Missouri to expend their own funds and to use funds that are made available to them from federal, state, or local sources, either public or private, in carrying out the provisions of the Act."

The Bruce letter raises the following questions:

1. Does a soil conservation district come within the compass of the term "local organizations" as that term is used in Public Law 566, enacted by the 83rd Congress?

It clearly does so. The final paragraph of paragraph #2 of Sec. 2 of Public Law 566, states:

"'Local organization' - any State, political subdivision thereof, soil or water conservation district, flood prevention or control district, or combinations thereof, or any other agency having authority under State law to carry out, maintain and operate the works of improvement.'"

2. Does a soil conservation district have the authority to carry out, maintain, and operate "works of improvement" under the watershed protection and flood prevention act, which is Public Law 566?

On January 13, 1955, this department rendered an opinion, a copy of which is enclosed, to J. H. Longwell, Director, Division of Agricultural Science, University of Missouri, Columbia, Missouri. That opinion, as you will note holds that "supervisors of a soil conservation district may administer the business of that portion of a small water-

Honorable L. O. Carpenter

shed which lies within the soil conservation district of which they are supervisors."

You will note that the above opinion, in regard to the authority which the supervisors of a soil conservation district have over that portion of a small watershed which lies within the soil conservation district of which they are supervisors, holds that the supervisors may "administer the business" of the small watershed. We believe that this term is inclusive of the management, improvement, control, and complete direction of the small watershed and includes "works of improvement".

3. Your final question is whether the supervisors of a soil conservation district have the authority to expend their (the soil conservation districts') own funds, and to use funds made available to them from federal, state, or local sources, either public or private, in carrying out the provisions of the act (Public Law 566)?

We believe that the answer to this question is in the affirmative. Subparagraph 2 of Paragraph 2 of Section 278.120 RSMo 1949, quoted on page 3 of the Longwell opinion states that the supervisors of a soil conservation district shall have the authority (to cooperate or enter into agreements with, and to aid within the limits of appropriations duly made available to it by law, any agency, governmental or otherwise, or any land representative within that soil district, in the saving of the soil within that district.* * *)

CONCLUSION

It is the opinion of this department that a soil conservation district is a "local organization" within the meaning of Public Law 566; that the supervisors of a soil conservation district have authority to carry out, maintain, and operate "works of improvement" of that portion of a small watershed which lies within the soil conservation district of which they are supervisors, under the Watershed Protection and Flood Prevention Act, which is Public Law 566; that the supervisors of a soil conservation district have the authority to expend the funds of the district, and to use funds that are made available to them from federal, state, or local sources, both public and private, in carrying out the provisions of the Watershed Protection and Flood Prevention Act as set forth in Public Law 566.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

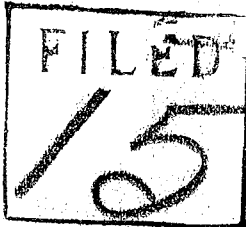
Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

AGRICULTURE:
EGG LAW:
RULES AND
REGULATIONS:

Review of proposed rules and regulations of the
Department of Agriculture implementing House Bill
No. 177 of the 68th General Assembly.



July 27, 1955

Honorable L. C. Carpenter
Commissioner, Department of Agriculture
Jefferson City, Missouri

Dear Mr. Carpenter:

By letter bearing date of July 8, 1955, you have requested this office to review certain proposed rules and regulations of your department implementing House Bill No. 177 of the 68th General Assembly.

Pursuant to your request those rules and regulations have been reviewed, and all appear to be authorized by said House Bill No. 177, except as hereinafter noted.

In proposed Regulation (1) the phrase "and any eggs that are adulterated as such term is defined pursuant to the Federal Food, Drug and Cosmetic Act" is improper. Section 196.310(j) requires the Commissioner of Agriculture to define "inedible eggs" in accordance with the specifications of the United States Department of Agriculture. The obvious intent of that subsection is to require the Commissioner to set out in detail in his rules and regulations the definition of "inedible eggs" so that the public may be able to ascertain the meaning thereof by reference to the rules and regulations without the necessity of recourse to Federal laws and regulations. It is suggested that the definition of "adulterated eggs" be set out in the regulations.

Proposed regulation (4) is invalid. Section 196.320 prohibits the sale of eggs:

"(c) Which are mislabeled by the placing or presence of any false, deceptive or misleading mark, term, statement, design, device, inscription, or any other designation, upon any eggs or upon any container or subcontainer of eggs, or upon

Honorable L. C. Carpenter

the label or lining or wrapper thereof,
or upon any placard or sign used in
connection therewith, or in connection
with any bulk lot or display having
reference to eggs."

That section does not authorize the Commissioner to declare what constitutes false, deceptive or misleading labeling. Nor does subsection (a) of Section 196.320 authorize regulation (4). That section refers to the size and grade designations described by Section 196.312 and regulation (3).

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul McGhee.

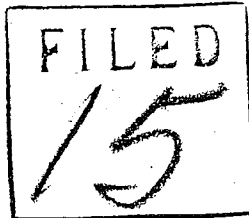
Yours very truly,

John M. Dalton
Attorney General

PMcG:mw

CITIES, TOWNS AND VILLAGES:

LEGAL PUBLICATIONS:



Cities of Fourth Class must publish financial statement required by Sec. 79.160 RSMo 1949, in newspaper meeting requirements set forth in Sec. 493.050 RSMo 1949. Described financial statement does not meet requirements of Sec. 79.160 RSMo 1949

August 18, 1955

Honorable John R. Caslavka
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

The following opinion is rendered in reply to your inquiry reading as follows:

"Section 79.160 VAMS 1949, commands the Board of Aldermen of a City of the Fourth Class, to semiannually make out and spread upon their records a full and detailed account and statement of their receipts and expenditures and to publish the same in some newspaper in the city.

"Section 493.050 VAMS, 1949, indicates that public advertisements and orders of publication, required by law to be made shall be published only in certain newspapers.

"For your convenience I am enclosing herewith a copy of the semiannual statements that was published by the City of Greenfield, Missouri, in the Dade county Advertiser, a newspaper that has not been published for the period of three (3) years as set out in Section 493.050 and respectfully request your opinion on the following matters.

"1) Must the semiannual statement be published in a paper qualified under Section 493.050, VAMS, 1949?

"2) Does the form and contents of the statement meet the requirements of Section 79.160?"

Honorable John R. Caslavka

In order that no doubt will exist as to the "financial statement" to which remarks in this opinion are addressed, we quote in full the "financial statement" forwarded with your inquiry:

"FINANCIAL STATEMENT

"Financial statement of the City of Greenfield of the year
1954 to 1955

GENERAL FUND

Balance on Hand July 1, 1954 OD	\$ 23.03	
Received Since	8,954.73	
Paid Out	<u>17,343.98</u>	
July 1, 1955 Balance, OD.		\$ 8,412.28

STREET AND ALLEY FUND

Balance on Hand July 1, 1954, OD.	\$ 6,387.51	
Received Since	<u>5,208.26</u>	
Paid Out	4,089.16	
July 1, 1955 Balance, OD.		\$ 5,268.41

PARK FUND

Balance on Hand July 1, 1954.	\$ 0,000.00	
Received Since	<u>1,751.94</u>	
Paid Out	1,679.48	
July 1, 1955 Balance.		\$ 72.46

METER FUND

Balance on Hand July 1, 1954.	\$ 200.00	
Received Since	<u>000.00</u>	
Paid Out	000.00	
July 1, 1955 Balance.		\$ 200.00

BAND FUND

Balance on Hand July 1, 1954.	\$ 85.02	
Received Since	<u>876.35</u>	
Paid Out	666.50	
July 1, 1955 Balance.		\$ 294.87

Honorable John R. Caslavka

WATER FUND

Balance on Hand July 1, 1954.	\$ 7,326.80	
Received Since	10,527.99	
	<hr/>	
Paid Out.	3,571.91	
July 1, 1955 Balance.		\$14,282.88
		<hr/>
July 1, 1955 Grand Total.		\$ 1,169.52

Lee Stivers
Clerk

E. O. Ball
Mayor "

For the purpose of this opinion we adopt your conclusion that the "Dade County Advertiser" does not meet the requirements necessary to qualify for publishing legal notices under Section 493.050, RSMo 1949.

On July 5, 1938, this office rendered an opinion to Mr. A. E. Long, City Clerk of Rolla, Missouri, construing Section 13775 R.S. Mo 1929, which statute, with subsequent amendments, is now found at Section 493.050, RSMo 1949. In such opinion, a copy of which is enclosed, it was held that the statement required to be published in cities of the Fourth Class by Section 6965, R.S. Mo. 1929 (Sec. 79.160, RSMo 1949) must be published in a newspaper which fully complied with Section 13775, R.S. Mo. 1929. Such opinion has been reviewed in the light of present language found in Section 493.050, RSMo 1949, and the opinion is considered correct in the light of our present statute.

We next consider the form of "financial statement" submitted with your inquiry. Section 79.160, RSMo 1949, applicable to cities of the Fourth Class, provides:

"The board of aldermen shall semi-annually in January and July of each year make out and spread upon their records a full and detailed account and statement of the receipts and expenditures and indebtedness of the city for the half year ending December thirty-first and June thirtieth, preceding the date of such report, which account and statement shall be published in some newspaper in the city."
(Emphasis supplied)

Honorable John R. Caslavka

The "financial statement" quoted in the forepart of this opinion can not, on its face, be construed as a "full and detailed account and statement of the receipts and expenditures and indebtedness" of the city, as such descriptive language is used in Section 79.160 RSMo 1949. It does not purport to descend into details with reference to any of the six separate funds treated in the statement. No citation of authority is necessary to support the conclusion that such "financial statement" is wholly inadequate to meet the minimum requirements of Section 79.160 RSMo 1949.

CONCLUSION

It is the opinion of this office that the financial statement which cities of the Fourth Class are required to publish under the directive contained in Section 79.160, RSMo 1949, must be published in a newspaper meeting requirements set forth in Section 493.050, RSMo 1949. It is the further opinion of this office that the "financial statement" referred to in the foregoing opinion does not meet the requirements of Section 79.160, RSMo 1949.

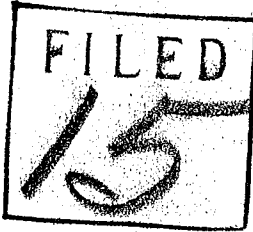
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

JOHN M. DALTON
Attorney General

JLO'M:gm

TAXATION: After township assessor has delivered
TOWNSHIP ASSESSORS: assessor's book to county clerk he may not
COUNTY ASSESSORS: repossess it in order to correct erroneous
ASSESSMENTS: valuations of property. Such corrections
may be made only by county board of equalization.



September 6, 1955

Honorable John R. Caslavka
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Mr. Caslavka:

This is in response to your request for opinion dated July 16, 1955, which reads as follows:

"One of the township assessors of Dade County, Missouri (which is under Township Organization), for the calendar year, 1955, duly assessed the residents of his township, and had them affix their signatures to the assessment sheet. However, when he transcribed the figures to the Assessor's Book, he changed the figures so that the amounts on the assessment sheet and the Assessor's book do not correspond. Obviously the amounts should correspond and it is impracticable for the County Board of Equalization to call each taxpayer from this Township to meet with the Board of Equalization for this purpose. I would appreciate your opinion on the correct way of making this change, and if it is necessary or possible to re-assess all the property and make a new assessor's book."

The manner and mode of assessing property for taxation in counties of township organization is provided for in Section 137.440, RSMo 1949, which reads, in part, as follows:

"The assessor or some suitable person empowered by him, shall, within the time prescribed by law, and after being furnished with the necessary blanks proceed to take a list of the taxable property of

Honorable John R. Caslavka

his township and assess the value thereof in accordance with the provisions of the general laws of this state in relation to the assessment of real and tangible personal property by county assessors, in all things pertaining to the discharging of his official duties, except when the same may be inconsistent with the provisions of this chapter; * * *

To ascertain the solution to your problem we must revert to the general law applicable to the assessment of property by county assessors.

You have made a statement in your letter by way of premise with which we do not agree. You have said that the valuations placed on the assessment lists by the property owner should correspond with the valuations placed on the assessor's book by the assessor. That is not necessarily true.

It has been held by the Supreme Court on many occasions that the assessor is not bound by the valuations placed by the taxpayer on the assessment list. For example, it was said in State ex rel. Dobbins v. Reed & Sutton, 159 Mo. 77, 60 S.W. 70, at Mo. l.c. 83, 85:

"While the above section requires that the list to be furnished to the assessor by the taxpayer shall contain a list of the real estate and its value, and while said section requires the taxpayer to make affidavit to such list, yet that is not binding on the assessor, nor does said list constitute the assessment of the taxpayer's real estate.
* * *

* * * * *

"When, then, is the time at which the assessment of real property is required to be made? Certainly it is not at the time the owner of the land delivers his list to the assessor, nor until the assessor enters the list upon his assessor's book, because by the very letter of the statute he is required to value and assess all property on the assessor's book, which clearly means

Honorable John R. Caslavka

that it cannot be assessed until the list is copied into the assessor's book. It is not so with respect to personal property which he is required to assess according to its cash price at the time of listing the same for taxation."

In making the assessments the assessor acts in a judicial capacity (State ex rel. Wyatt v. Hoyt, 123 Mo. 348, 27 S.W. 382) and jurisdiction attaches when he makes out the assessor's book (State ex rel. Steel v. Phillips, 137 Mo. 259, 264, 38 S.W. 931). He is guided not alone by the list returned by the taxpayer but also takes into consideration the assessment books of previous years and other proper matter (Wymore v. Markway, 338 Mo. 46, 89 S.W. (2d) 9, 14). Therefore, the valuations placed in the assessor's book by the assessor need not necessarily correspond with those placed on the assessment list by the taxpayer; they may be either higher or lower.

Of course, if they are higher, notice of the increase must be given the taxpayer. Section 137.180, RSMo 1949, with regard to real estate expressly requires such notice:

"Whenever any assessor shall increase the valuation of any real property he shall forthwith notify the record owner of such increase, either in person, or by mail directed to the last known address; every such increase in assessed valuation made by the assessor shall be subject to review by the county board of equalization whereat the land owner shall be entitled to be heard, and the notice to the land owner shall so state."

Although the statutes do not expressly require notice of an increase in valuation of personal property, the courts have held that such notice is necessary. State ex rel. Ziegenhein v. Spencer, 114 Mo. 574, 21 S.W. 837; State ex rel. Ford Motor Co. v. Gehner, 325 Mo. 24, 31, 27 S.W.(2d) 1; Wymore v. Markway, 338 Mo. 46, 89 S.W. (2d) 9.

Honorable John R. Caslavka

The entire scheme of assessment was outlined by the Supreme Court in State ex rel. Pehle v. Stamm, 165 Mo. 73, 65 S.W. 242, at Mo. l.c. 80;

"The scheme outlined by the statute above referred to evidently is, that all property subject to taxation shall be assessed by the county assessor, whose judgment as to the value thereof should control in the first instance. In order to enable the assessor to properly discharge his duties the State and county are to furnish him with lists and plats and the property-owner with verified lists of his taxable property. To guard against an overvaluation by the assessor, the right of appeal is given to all persons believing themselves aggrieved thereby, and for that purpose a court of appeals is established to determine such appeals and correct the assessments accordingly. With a view of bringing the assessment to the attention of all persons assessed, the assessment is required to be filed in a public office accessible to every person, two months before the meeting of the court of appeals, the time and place of which is unchangeably fixed by law. To provide against undervaluation of individuals, a board of equalization is created, with power to equalize assessments by decreasing excessive valuation, and increasing valuations deemed too low."

If the changes in valuation by the assessor were intentional and if a taxpayer having had notice of an increase in valuation feels himself aggrieved, his remedy is with the county board of equalization, for no other body would have the authority to change the valuations.

Assuming, however, that the discrepancies between the assessment lists and the assessor's book were not intentional but were mere errors in transferring the figures from the list to the assessor's book, the question remains as to whether he now has the authority to repossess himself of the book and correct his own errors.

Section 137.245, RSMo 1949, requires the assessor to file a verified copy of the assessor's book with the county clerk on

Honorable John R. Caslavka

or before May 31. We assume that this has been done and that the assessor's book is now in the hands of the county clerk.

As stated above, the assessor in making his assessments acts in a judicial capacity and jurisdiction attaches when he makes out the assessor's book. It was further held in the Wymore v. Markway case, supra, 89 S.W. (2d) 1.c. 13:

" * * * the return of this book to the county clerk's office completes the assessment and terminates his jurisdiction. * * *"

A situation analogous to this one was presented in the case of State ex rel. Flaugh v. Jaudon, 286 Mo. 181, 227 S.W. 48. There, the city assessor of Kansas City had duly assessed the property of the city and had delivered his books to the city clerk as required by the city charter. Subsequent to that, the State Tax Commission increased the valuation of land in Kansas City by twenty per cent. Thereafter, the city assessor re-possessed himself of the assessor's books from the city auditor and increased the valuations so as to reflect the twenty per cent increase ordered by the Tax Commission for state and county purposes. The facts differ from this case in that more steps had been taken and that it was a city assessment, but we believe the reasoning of the court equally applicable to this case. The court said, Mo. 1.c. 201:

"The question here is, was the Assessor's action completed prior to June 1, 1920? The agreed facts show that the City Assessor did duly deliver his Land Assessment Books to the City Clerk on March 15, 1920. Under the city charter he had then performed his full duties. (Sec. 6, Art. 5, Charter of Kansas City.)

"By Section 12 of Article 5, this delivery to the City Clerk is a delivery likewise to the Common Council. There is no authority in the city charter for such assessor to re-possess himself of these delivered books, and thereafter make a new and different assessment. His work was completed upon the delivery of the books to the City Clerk and through such clerk to the Common Council. (Secs. 6 and 12, Art. 5, City Charter.) For this act of the Assessor in re-possessing himself of the books, and making therein a new and different

Honorable John R. Caslavka

assessment, the respondent should be able to point to the authority for such act. He has not done so, and cannot do so. The books as delivered by the City Assessor to the City Clerk on March 15, 1920, with the land values therein, are the books to control the city taxes for 1920. The subsequent attempted assessment is void, as being unauthorized either by charter or law. This must be true for the reason that the city scheme provided for a Board of Appeals. To this board the taxpayers could at least go for the corrections of irregularities and mistakes in the assessor's work. * * *

By the same token, there is no authority in law for the township assessor to repossess himself of the assessor's book from the county clerk. When he delivers it to the county clerk, the assessment is complete and his jurisdiction ceases. If there are errors in the valuations, the scheme of taxation provides that they are to be corrected by the board of equalization (Sec. 137.275, RSMo 1949; Sec. 138.060, RSMo 1949).

The Supreme Court of Missouri said in State ex rel. Ford Motor Co. v. Gehner, 325 Mo. 24, 27 S.W. (2d) 1, at Mo. l.c. 31:

"The assessments made on personal property by the assessor are subject to review of the board of equalization. This body and the assessor act judicially. (St. Louis, etc. Insurance Company v. Charles, 47 Mo. 462, l.c. 466; North Missouri Railroad Company v. Maguire, 49 Mo. 482, l.c. 483; State ex rel. Wyatt v. Hoyt, 123 Mo. 348, l.c. 356, 27 S.W. 382; State ex rel. Johnson v. Merchants & Miners Bank, 279 Mo. 228, l.c. 234, and cases, 213 S.W. 815.) So far as the same officers have analogous duties in respect to the assessment and equalization of income taxes, their acts in connection therewith are likewise judicial in character.

"The assessment of personal property made by the assessor becomes final unless changed by the board of equalization. Thereafter the assessing authorities have no jurisdiction or power to reopen the assessment. (State

Honorable John R. Caslavka

ex rel. Hopkins v. Tobacco Co., 140 Mo. 218, 1.c. 223, 41 S.W. 776; State ex rel. Hayes v. Seahorn, 139 Mo. 582, 1.c. 610, 39 S.W. 809; State ex rel. Wenneker v. Cummings, 151 Mo. 49, 1.c. 59, 52 S.W. 29.) Nor may these officers increase the assessment without notice to the taxpayer. (State ex rel. Ziegenhein v. Spencer, 114 Mo. 574, 21 S.W. 837.) * * *

We assume also that the county board of equalization met on the second Monday in July, as required by Section 138.010, RSMo 1949. If it has adjourned so that it cannot correct the errors of the assessor, if such they were, nothing can be done because to allow the assessor to make out a new set of books at this time would deprive the taxpayer of the right to appeal to that board, which is a valuable legal right. On the other hand, if the board is still in session, it has until September 1 to correct and adjust the assessor's book (Sec. 137.290, RSMo 1949.)

CONCLUSION

It is the opinion of this office that after the township assessor has delivered the assessor's book to the county clerk he may not repossess himself of it in order to correct erroneous valuations of property and that such errors in valuation may be corrected only by the county board of equalization.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

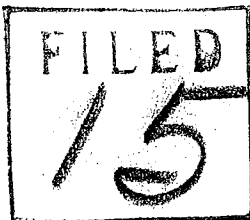
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

AGRICULTURE:
ICE CREAM:

House Bill 257 enacted by the 68th General Assembly relating to the manufacture and sale of ice cream and related frozen products as defined therein does not relate to the manufacture and sale of other products not defined in said Act.



September 29, 1955

Honorable L. G. Carpenter
Commissioner, Department of Agriculture
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"In our attempt to interpret House Bill No. 257, a problem has arisen in which your opinion is greatly needed.

"Section 196.855 states as follows: 'For the purpose of this Act the products within its purview are defined as follows, and each definition is so framed to exclude substances not mentioned in the definition and in each instance imply that the product is clean and sound.'

"The above mentioned section continues with a definition of ice cream stating, 'that the content of milk fat and total milk solids are not less than 10% and 20% respectively.' The section continues with a definition of ice milk stating, 'that it contains not less than 2% but not more than 3.5% of milk fat.' Ice milk in the semifrozen state as drawn direct from the continuous freezer for resale as such contains not less than 3.5% but not more than 6% milk fat. Frozen malted milk contains not less than 6% by weight of milk fat and not less than 3% by weight of malted milk.

Honorable L. C. Carpenter

"Now the question arises, does this new Law exercise any jurisdiction over a frozen product with a milk fat content ranging from 3.5% to 10% provided, it is not called either ice cream or ice milk?

"Again, does this new Law exercise any jurisdiction over a semifrozen product containing no malted milk and with a milk fat content ranging from 6% to 10%?

"Does this Law make illegal the manufacturing and/or selling of products falling into the above categories?

"To be more specific, an establishment freezes and sells a product that conforms in all respects to the definition and standards of identity for ice milk, except, that it contains 7% milk fat. This product is neither sold, advertised or labeled as ice cream or ice milk."

Section 196.850 relating to the applicability of House Bill 257 as enacted by the 68th General Assembly provides as follows:

"The provisions of this Act shall apply to all ice cream and related frozen food products defined in Section 196.855; and the purpose of this Act is declared to be to secure the wholesomeness and purity of such products and to prevent confusion, fraud and deception in connection with their manufacture and sale and to make unlawful the misbranding and adulteration of such products. Nothing in this act shall be construed to apply to any product of frozen dessert using skim milk or skim milk powder when combined with vegetable fats or oils."

It is to be noted that by the specific provisions of said section said act shall apply to ice cream and related frozen fppd products "defined" in Section 196.855. It is a well known

Honorable L. C. Carpenter

rule of statutory construction that the expression of one thing is the exclusion of another. *Keane v. Stredtman*, 323 Mo. 161, 18 S.W. 2d. 896. Applying the rule here we are of the opinion that the provisions of House Bill 257 are applicable only to the products defined in the act and are inapplicable to products which are not therein defined. This interpretation is fully and completely borne out by the following section which provides in part as follows:

"196.855. "For the purpose of this Act the products within its purview are defined as follows, and each definition is so framed to exclude substances not mentioned in the definition and in each instance imply that the product is clean and sound: * * *"(Emphasis ours.)

Section 196.855 defines certain products under the "purview" of the act. While we do not deem it necessary to set said definition section out at length herein we do wish to refer to some of the definitions insofar as they are pertinent to the question at hand. "Water Ice" as defined does not contain any milk fat or milk solids. "Sherbert" as defined may contain from 0 to 2½% by weight milk fat, and from 0 to 5% total milk solids. "Ice milk" in the frozen state is defined as containing not less than 2% nor more than 3½% milk fat and not less than 11% total milk solids. "Ice milk" in the semifrozen state as drawn direct from the continuous freezer for resale as such is defined as containing not less than 3½% nor more than 6% of milk fat and not less than 14% total milk solids. "Frozen malted milk" is defined as containing not less than 6% by weight of milk fat. "Ice cream" is defined as containing in no event less than 8% milk fat nor less than 16% total milk solids. "French Ice Cream." "Frozen Custard," "French Custard Ice Cream" as defined all contained the same milk fat and total milk solids as ice cream, supra.

You first inquire whether House Bill 257 applies to a "frozen" product with a milk fat content ranging from 3½% to 10% provided it is not called either ice cream or ice milk. From its definition herein noted such a product might be "Ice cream" which might, under the act, contain as low as 8% milk fat. If such product would not meet the definition of "Ice cream" then we are of the opinion that it would not be subject to the provisions of House Bill 257 provided it was not labeled or sold as a product defined in the act.

Honorable L. C. Carpenter

You next inquire whether the provisions of House Bill 257 apply to a "semifrozen" product containing no malted milk and containing a milk fat content ranging from 6 to 10%. The only product not containing malted milk defined in the act as being in the semifrozen state is "Ice milk" which may not contain more than 6% milk fat. In view of this fact, we are of the opinion that House Bill 257 would not apply to a product in the semifrozen state containing more than 6% milk fat and which does not contain malted milk.

Lastly, you inquire whether a product, which conforms in all respects to the definition and standards of ice milk, except that it contains 7% milk fat, is subject to the provisions of House Bill 257 where such product is not sold, advertised or labeled as ice cream or ice milk. As has been pointed out, ice milk in the frozen state is defined as containing not more than $3\frac{1}{2}\%$ milk fat and ice milk in the semifrozen state as drawn direct from the continuous freezer for resale is defined as containing not more than 6% milk fat.

In view of these definitions and in view of the fact that by the specific provisions of the Bill substances not mentioned are excluded, we are of the opinion that such a product as you refer to, is not subject to the provisions of House Bill 257.

CONCLUSION

It is, therefore, the opinion of this office that House Bill 257, enacted by the 68th General Assembly, does not relate to a "frozen" product with a milk fat content ranging from $3\frac{1}{2}\%$ to 8%, nor does said Bill pertain to a semifrozen product, containing no malted milk, with a milk fat content ranging from 6 to 10%.

We are further of the opinion that a product that conforms in all respects to the definition and standards of identity for "ice milk," except that it contains 7% milk fat, is not subject to the provisions of House Bill 257 so long as it is not sold, advertised or labeled as ice cream or ice milk.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:mw

SCHOOLS:
SCHOOL DISTRICTS:
INSURANCE:
COUNTY FOREIGN INS. TAX FUND:
COUNTY CLERK:



Apportionment of funds received from County Foreign Insurance Tax Fund in July, 1955, should have been made on basis of 1954 enumeration; district receiving less than its proper share of supplemental apportionment can sue districts receiving excess amounts and recover such amounts provided money has not already been spent for school purposes; error may also be corrected voluntarily by co-operative action of officers and agencies concerned.

November 21, 1955

Honorable Robert L. Carr
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Mr. Carr:

This is in response to your request for opinion dated September 21, 1955, which reads as follows:

"In July, 1955, the Washington County Treasurer received from the State Auditor a supplementary apportionment by the State Comptroller from the County Foreign Insurance Tax Fund to be distributed by the County Clerk to the various school districts for free text books as provided in Section 170.220 R.S.Mo. 1949. This special distribution came at a different time from the regular annual October payment, and was in the amount of \$7,322.00.

"According to a letter dated July 8, 1955, from Hubert Wheeler, Commissioner of the Division of Public Schools, directed to all District and County Superintendents, 'the amount paid to school districts in this apportionment is \$1,366 cents per pupil based on the 1954 enumeration.' The Clerk of the Washington County Court distributed the money to the various school districts within the county according to an enumeration of students taken in May, 1955, when 2221 children were enumerated in Reorganized School District R-3, which enumeration was 1614 less than were enumerated in 1954. The change was due to a change of boundary line voted at the annual election of April 5, 1955, in which an area of about ninety square miles was taken from

Honorable Robert L. Carr

Reorganized School District R-3 and attached to a common school district, Kingston No. 14, Washington County. If, as outlined in Mr. Wheeler's letter, the County Clerk should have distributed to Reorganized School District R-3 the sum of \$1.366 per pupil based on the 1954 enumeration, Reorganized School District R-3 was entitled to receive the sum of \$5,238.61; instead the Clerk distributed to Reorganized School District R-3 the sum of \$3,581.45, which represents a shortage of \$1,657.16. The result was, of course, that the other school districts within Washington County received more money per pupil from the apportionment than the \$1.366 per pupil figure mentioned by Mr. Wheeler.

"The directors of District R-3 contend that the County Clerk was in error in making the distribution as described, and it is the position of the County Clerk that he acted in accordance with Section 170.220 R.S.Mo. 1949, which directs the Clerk to apportion the free text book funds to each school district, 'by multiplying the number of children on the last enumeration list of said school district by the ratio used by the State Auditor in making the distribution of said Foreign Insurance Tax Money among the counties of the state,'.

"The opinion of your office is respectfully requested as to whether the County Clerk should have used the enumeration list made in 1954, or the May, 1955, enumeration, when he distributed the free text book funds. Further, if the 1954 enumeration should have been used by the Clerk, what means may be followed to correct the error, that is to recover the overpayment to districts which were overpaid, if they were, and pay the Reorganized School District R-3 the sum of money to which it was properly entitled?

"In his letter dated July 18, 1955, a copy of which was mailed to your office, Mr. Newton Atterbury, State Comptroller and Director of the Budget, suggested that we seek assistance from your office, and reference is made to his letter."

Honorable Robert L. Carr

The basis of the apportionment of the County Foreign Insurance Tax Fund is set forth in Section 148.360, RSMo 1949. That section provides:

"On or before the first day of October of each year, the state comptroller shall apportion to the counties and the city of St. Louis, on the basis of the number of school children in each, as shown by the last enumeration, certified by the commissioner of education, on which the school moneys are apportioned and distributed, all of the moneys to the credit of the county foreign insurance tax fund, and warrants shall be issued in favor of the treasurers of the counties and the city of St. Louis."

This section is further supplemented by Section 170.220, RSMo 1949, to which you refer and which, in part, reads as follows:

"1. When the money apportioned under the provisions of section 148.360, RSMo 1949, has been received by the treasurers of the various counties and the city of St. Louis, it shall be the duty of the county clerk of each county to apportion said money among the various school districts in each county in the following manner: The amount to be apportioned to each school district shall be determined by multiplying the number of children on the last enumeration list of said school district by the ratio used by the state auditor in making the distribution of said foreign insurance tax moneys among the counties of the state, and the county court shall order the county treasurer to place to the credit of the free textbook fund of each such school district, the amount thus obtained, or shall draw its warrant in favor of the proper township treasurer or treasurers for the amount due the districts of the various townships, and shall also draw its warrant in favor of the treasurer of any school district organized as a city, town or consolidated district for the amount due such district. The money thus received shall be known as the 'Free Textbook Fund' for each such district, and the board

Honorable Robert L. Carr

of education or the board of directors of each such district shall, when so directed by a majority vote of the qualified voters of the district voting on such question at an annual or special election, with this fund purchase and provide textbooks free for the use of the pupils in the elementary grades and after free textbooks have been supplied to all children in the elementary grades, the balance remaining in said textbook fund may be expended for supplementary, library, and reference books."

In the analysis of this problem it might be well at this juncture to point out some discrepancies in the legislative scheme for the apportionment of this fund which have been brought about by the amendment of certain sections of the law without consideration being given to the whole scheme.

For example, Section 148.360, supra, provides that the basis for apportioning this fund is the last enumeration, "certified by the commissioner of education, on which the school moneys are apportioned and distributed." At the time of the passage of Section 148.360 in 1874 school moneys were apportioned on the basis of enumeration. Since then, however, other laws have been revised and amended so that apportionment of state school moneys is no longer on the basis of enumeration but on the basis of average daily attendance, etc. (Section 161.030, RSMo 1949; Senate Bill No. 3, 68th General Assembly, approved by the people on October 4, 1955.) Further, Section 148.360 assumes a certification of the last enumeration by the commissioner of education to the comptroller, but at no place is such certification expressly called for. The only enumeration of children of school age is that provided for in Section 164.030, RSMo, Cum. Supp. 1953. It is to be noted that the directives with regard to the certification of the enumeration of children, other than the deaf and dumb and the blind, stop with the county clerk. There is no express provision for the certification of the enumeration lists by the county clerk to the commissioner of education.

Yet, if the commissioner of education is to supply the information by way of a certification of the enumeration lists which will form the basis for the apportionment of this fund, he must receive the information from some source. This hiatus in the law has been overcome by a construction of Section 160.090, RSMo 1949, Subsection 2, Subsection (4) of which provides that the State Board of Education shall "Require of county clerks * * * copies of all records by them required to be made, and all such other information in relation to the funds and condition of schools and the management

Honorable Robert L. Carr

thereof as may be deemed necessary." By virtue of this section the State Board of Education annually requires the county clerk to submit a report showing an abstract of the enumeration lists of his county.

These enumeration lists are required by the Department of Education to be submitted by the 31st day of July. This gives ample time after receipt of the lists by the county clerk for him to certify the abstract of such list to the State Board of Education. In the normal course of events, then, the apportionment of the County Foreign Insurance Tax Fund required to be made by the comptroller by October 1 would be on the basis of the enumeration for that year certified by the commissioner of education sometime after July 31.

Biennially, in anticipation of the amount to be realized for the next biennial period from this source of revenue, the Legislature appropriates a fixed amount from the state treasury to be apportioned according to law, i.e., Sections 148.360, 170.220, supra, etc. The amount appropriated may be more or less than the amount actually received. In the 1953 Session, 67th General Assembly, Laws of Missouri, 1953, Section 3.180, page 47, the appropriation was worded thus:

"There is hereby appropriated out of the state treasury, chargeable to the County Foreign Insurance Tax Fund, the sum of Seven Million Five Hundred Thousand Dollars (\$7,500,000.00), or so much thereof as may be available, to be apportioned among the several counties of the state and the city of St. Louis, as provided by law; for the period beginning July 1, 1953 and ending June 30, 1955." (Emphasis supplied.)

As a matter of fact, the amount received from this source in 1954 exceeded the balance remaining within the appropriation limits, so that in 1955 the 68th General Assembly, by House Bill No. 11, approved by the Governor on May 6, 1955, appropriated out of the state treasury the amount remaining chargeable to this fund. Section 16 of House Bill No. 11, 68th General Assembly, reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the County Foreign Insurance Tax Fund, the sum of One Million Two Hundred Twenty-four Thousand Four Hundred Sixteen Dollars and Seventy-one Cents (\$1,224,416.71), or so much

Honorable Robert L. Carr

thereof as may be available, to be apportioned among the several counties of the state and the city of St. Louis, as provided by law, for the period ending June 30, 1955.

"The foregoing amount is in addition to the amount appropriated for a similar purpose for the 1953-55 biennial period as set out in Section 3.180 of House Bill No. 325, an Act of the 67th General Assembly."

In making this supplemental appropriation the Legislature made it clear that it was a part of the appropriation previously made for the biennium beginning July 1, 1953, and ending June 30, 1955. It constituted a part of the funds which should have been apportioned to the several counties and the city of St. Louis by October 1, 1954, but which, because of inadequate appropriation, could not be so apportioned until this supplemental appropriation was made.

When Section 148.360 refers to "the last enumeration" as the basis for the apportionment by the comptroller, it clearly refers to the last enumeration certified to him by the commissioner of education. Since, at the time this supplemental apportionment was made, the last enumeration certified to the comptroller was that for the year 1954, the apportionment to the counties had to be made on that basis. Section 170.220 requires the county clerk to apply the same ratio used by the state auditor (comptroller) in making the distribution, and there is no authority for the county clerk to use any other ratio. Therefore, "the last enumeration" referred to in that section must also mean the last enumeration certified to the comptroller by the commissioner of education on which the apportionment to the counties was based.

Normally, of course, if the entire apportionment were made by October 1, the last enumeration certified by the commissioner of education to the comptroller would be the same as the last enumeration taken in the various districts. It is only in this unusual circumstance created by the time element that this divergence appears.

It must be borne in mind that apportionments of state aid based upon enumeration are not and cannot be on a current basis. In this case the enumerations are made between April 30 and May 15, while the apportionment normally is not made until October 1. Changes in the number of children between the ages

Honorable Robert L. Carr

of six and twenty resident in the district could well occur in this period. Yet, there is no doubt but that the apportionment is made on the basis of the number resident in the district at the time the enumeration was made. Since this money received by the counties in July, 1955, was actually but a part of that which should have been and would have been apportioned to them on October 1, 1954, there is no inequity in using the 1954 enumeration as a basis of the apportionment. The change in the enumeration of Reorganized School District R-3 brought about by the boundary change of April 5, 1955, will be reflected in the apportionment to be made in October, 1955.

We are, therefore, of the opinion that the comptroller properly used the 1954 enumeration certified to him by the commissioner of education as the basis of his apportionment to the counties and that the county clerk of Washington County should also have used the 1954 enumeration in making his apportionment to the various districts of Washington County.

With regard to your further question concerning the means to be followed in correcting the error, we are enclosing a copy of an opinion directed to Honorable George Henry, Prosecuting Attorney of Newton County, under date of July 27, 1954. The conclusion of that opinion as applicable to this situation is that District R-3 could sue the other districts of the county for the funds which they received which should properly have been apportioned to it, provided the money has not been spent for school purposes by the district receiving it. There is no indication in your letter, however, that the other districts would not be willing to refund this money voluntarily without the necessity of legal action. If that is the case, we perceive no reason why the county clerk could not recompute the amounts due each district on the basis of the 1954 enumeration, using the ratio used by the state comptroller in apportioning the funds to the county. Then, the county court can order the county treasurer to make the proper correction on his books for the districts for which he acts as treasurer and request the other districts to return to the county treasurer the amount of the overpayment. When the funds are returned, the county court can then issue its warrant to the treasurer of District R-3 for the additional amount properly due it.

CONCLUSION

It is the opinion of this office that the supplemental apportionment of the County Foreign Insurance Tax Fund received by Washington County in July, 1955, should have been apportioned

Honorable Robert L. Carr

by the county clerk of Washington County to the various districts of the county on the basis of the 1954 enumeration, using the ratio used by the state comptroller in making the apportionment to the counties.

It is the further opinion of this office that Reorganized School District R-3 of Washington County which received less of this apportionment than it properly should have may sue the other districts of the county which received more than they should have and recover the excess, provided it has not already been spent for school purposes by the district receiving it, or the error may be corrected voluntarily by the co-operation of all the officers and agencies concerned in the manner set forth in the body of this opinion.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Enc.

PUBLIC LAW 566:

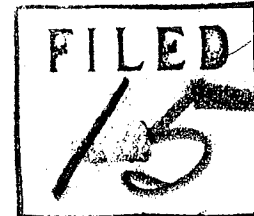
POLITICAL SUBDIVISIONS:

LOCAL ORGANIZATIONS:

A levee and/or drainage district and/or a county court is a "local organization" within the meaning of Public Law 566, and so is qualified to enter into cooperative agreements with the Secretary of Agriculture of the United States for works of improvement in flood and erosion control.

November 22, 1955

Honorable L. C. Carpenter
Commissioner Department of Agriculture
Jefferson City, Missouri



Dear Sir:

Your recent request for an official opinion reads as follows:

"On the date of July 18, 1955, you rendered an opinion which states, in part, as follows:

"It is the opinion of this Department that a soil conservation district is a "local organization" within the meaning of Public Law 566

"At a meeting of the Governor's Committee of the Missouri Watershed Protection and Flood Prevention program I was requested to secure from you an opinion as to whether or not other political sub-divisions within a given county might serve as a local organization.

"We are informed that in some other states county courts, levy districts, drainage districts and other corporate bodies are serving in that capacity.

"I am attaching hereto a copy of Public Law 566, passed in the 83rd Congress and on this copy of the Law have underlined or bracketed those sections which appear to pertain directly to this subject.

"If you have any question on this matter I trust that you will request of us the additional information you desire and we shall be glad to provide it."

All references to statutes, unless otherwise indicated, are to RSMo 1949.

Honorable L. C. Carpenter

Public Law No. 566 provides for cooperation between the federal government and "states and their political subdivisions . . . for the purpose of preventing damage . . ." by erosion, flood water, et cetera. The law further provides (Section 3, Public Law 566):

"In order to assist local organizations in preparing and carrying out plans for works of improvement, the Secretary is authorized, upon application of local organizations, if such application has been submitted to, and not disapproved within 45 days by, the State agency having supervisory responsibility over programs provided for in this Act, or by the Governor if there is no State agency having such responsibility--"

"Local organization" is by the bill defined to be:

"-- any State, political subdivision thereof, soil or water conservation district, flood prevention or control district, or combinations thereof, or any other agency having authority under State law to carry out, maintain and operate the works of improvement."

From the above, it would appear that any "political subdivision" would also be a "local organization" and so would be qualified to cooperate with the federal government in these projects.

Section 15, Article X of the Constitution of Missouri, states:

"Definition of 'other political subdivision.' -- The term 'other political subdivision,' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

Since levee and drainage districts and counties are "political subdivisions", they are, according to Public Law 566, qualified to cooperate as stated above.

In regard to the authority of county courts in these matters, we indicate Section 70.210, which reads:

"The term 'governing body' as that term is used in sections 70.210 to 70.320 shall mean the board, body or persons in which the powers of a municipality or political subdivision are vested. The term 'political subdivisions' as used in sections 70.210 to 70.320 shall be construed to include counties, townships, cities, towns, villages, school, road, drainage, sewer, levee and fire districts."

Honorable L. C. Carpenter

Also Section 70.220, RSMo 1949, which reads:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

CONCLUSION

It is the opinion of this department that a levee and/or drainage district and/or a county court is a "local organization" within the meaning of the Public Law 566, and so is qualified to enter into cooperative agreements with the Secretary of Agriculture of the United States for works of improvement in flood and erosion control.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

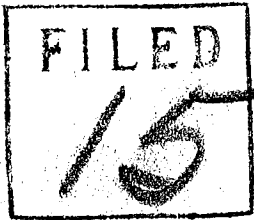
John M. Dalton
Attorney General

Encl.
HPW/hw/ld

DEPARTMENT OF CORRECTIONS:
MISSOURI STATE PENITENTIARY:
APPROPRIATIONS:

Construing House Bill 588, Sec. 13850,
appropriation for Missouri State
Penitentiary.

November 29, 1955



Colonel James D. Carter
Director, Department of Corrections
State of Missouri
Jefferson City, Missouri

Dear Colonel Carter:

This will acknowledge receipt of your request for an opinion,
which request reads:

"I respectfully request an opinion as to
my ability to expend monies from the
Department of Corrections Post War Funds
(Industrial Buildings and Equipment), to
purchase printing plant equipment for
installation at the Intermediate Reforma-
tory.

"This equipment will be used to establish a
vocational training program in the printing
arts, however, in planning a long range
program, this equipment and the trainees
developed thereby could be used as an
industrial activity for Department and State
printing requirements."

You refer in said request to an appropriation under House
Bill 588, passed by the 68th General Assembly of the State of
Missouri and particularly Section 13.850 of said appropriation
bill. This particular appropriation reads:

"There is hereby appropriated out of the
State Treasury, chargeable to the Post War Reserve
Fund, the sum of One Million Five Hundred Thousand
Dollars (\$1,500,000.00) for the use of the
Missouri State Penitentiary for Additions, Repairs
and Replacements, for the period beginning July
1, 1955 and ending June 30, 1957, as follows:

"Additions, Repairs and Replacements:

"For constructing and equipping buildings \$1,500,000.00."

Colonel James D. Carter

It is a well established principle of construction that if possible the statutory intent should be determined from the words which have been used, considering the language honestly and faithfully, to ascertain its plain and rational meaning and to promote its objects and manifest purposes, and when no technical language is employed in a statute the words used will be construed in their ordinary sense and with the meaning commonly attributed to them unless such construction will defeat the manifest intent of the Legislature. State ex rel. Allman vs. Hawk, 228 S.W. 785, 360 Mo. 490. See also Riley vs. Holland, 243 S.W.(2d) 79, 362 Mo. 682.

In State v. Moore, 69 N.W. 373, 376, 50 Neb. 88, 61 Ann. St. Rep. 538, the court held that, in view of the origin and history of appropriations, as well as the general lexicographic meaning of the word, "to appropriate" is to set apart from the public revenue a certain sum of money for a specific object in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other.

Said appropriation is not made to the Department of Corrections but is made for the use of the Missouri State Penitentiary, one unit of the Department of Corrections. While it is true that the Department of Corrections under Sections 216.010 and 216.020, VAMS, is vested with authority to supervise, manage, have control and jurisdiction over all penal, correctional and reformatory institutions of this state, as well as the real estate, buildings, equipment and facilities belonging to such institutions, it has been the practice of the General Assembly heretofore to appropriate to each separate institution, and this practice was followed by the 68th General Assembly, for instance, under House Bill 5, Section 5.020, passed by said Assembly, we find an appropriation for money out of the state treasury chargeable to the General Revenue Fund and also chargeable to the earning fund solely for the use of the state penitentiary. Under Section 5.030 of the same Bill we find another appropriation out of the state treasury solely for the use of the state penitentiary chargeable to the State Penitentiary Revolving Fund. Under Section 5.040 of the same Bill is another appropriation for money out of the state treasury chargeable to the General Revenue solely for the use of the Intermediate Reformatory at Algoa.

As we recall, the particular time this appropriation bill was under construction, the main reason for the General Assembly passing such bill was for the purpose of relieving the condition, and the tension, existing at the state penitentiary resulting from the recent riot, fire and damage caused at said penitentiary and to afford the administration at the penitentiary an opportunity to immediately begin a rehabilitation program and at the same time teach the inmates a trade.

Colonel James D. Carter

CONCLUSION

Therefore, it is the opinion of this department, that under the appropriation bill passed by the 68th General Assembly, State of Missouri, Section 13.850, House Bill 588, for funds out of the Post War Reserve Fund, such funds may be used only for the Missouri State Penitentiary and cannot be used by the Intermediate Reformatory to purchase printing plant equipment.

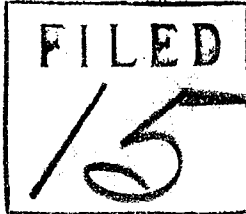
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

AGRICULTURE: Review of proposed rules and regulations of the
ECONOMIC POISONS: Department of Agriculture implementing House Bill
POISONS: 101 of the 68th General Assembly.



December 1, 1955

Honorable L. C. Carpenter
Commissioner of Agriculture
Jefferson City, Missouri

Dear Sir:

By letter bearing date of November 23, 1955, you have requested this office to review certain proposed rules and regulations of the Department of Agriculture implementing House Bill 101, enacted by the 68th General Assembly.

Pursuant to your request these rules and regulations have been reviewed and all appear to be authorized by said House Bill 101.

I note that it is stated that these regulations shall take full force and effect upon January 1, 1956. In order that this might be accomplished said rules, of course, would have to be on file with the Secretary of State at least ten days prior to said date.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:mw

ECONOMIC POISONS:
AGRICULTURE:
INSECTICIDES:

Mixture of fertilizer and insecticide is an
"economic poison".

December 5, 1955



Honorable L. C. Carpenter
Commissioner of Agriculture
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in answer to your recent request for an opinion of
this office, which request reads as follows:

"A question has arisen in my mind as to whether
or not a certain mixture of substances is an
economic poison, and if so, whether it ought to
come within the purview of H.B. 101 enacted by
the 68th General Assembly and now Chapter 263.270-
263.380, Revised Statutes of Missouri, 1949.

"Agricultural fertilizer is customarily sold in
sacks with about eighty (80) pounds to the sack
or in bulk sold by the ton. However, price is
usually quoted by the ton whether sold by sack
or in bulk. Over the past few years a practice
has arisen where an insecticide, namely Aldrin,
has been added to and mixed with the fertilizer
in an amount of about ten (10) pounds to a ton.
When this insecticide is added a separate charge
is made for it and the amount of the charge us-
ually increases the price of the product about
twenty per cent (20%). The clear purpose of the
addition of the insecticide is to combat insects
and not to preserve or enhance the quality or
quantity of the fertilizer or any of the fer-
tilizer components. The sack container may or
may not make individual claims for the added
insecticide.

"An opinion, therefore, is requested as to whether
or not this mixture of fertilizer and insecticide
is an economic poison within the law cited above
and, therefore, must comply with the law."

Honorable L. C. Carpenter

ATTACHMENT:

The term "economic poison" is defined in Section 263.270 V.A.M.S., September Pamphlet, as follows:

"The term 'economic poison' means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, fungi, weeds, or other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the commissioner, after a hearing, shall declare to be a pest; * * *

It is to be noted that under the definition of "economic poison" a mixture of substances is included. If, therefore, the mixture of substances is used for the purposes found in said definition, such mixture is an "economic poison". The fact that the mixture also contains a fertilizer does not exempt such mixture from coming within the purview of the definition of "economic poison".

Since you state in your opinion request that the mixture is used to combat insects, it is clear that the mixture involved does come within the definition of "economic poison". It follows, therefore, that, since such mixture comes within the definition, the provisions of the Economic Poisons Act, Secs. 263.270 to 263.380 V.A.M.S. are applicable to such mixture.

CONCLUSION

It is the opinion of this office that a mixture of substances coming within the definition of "economic poison", and which mixture is used for the purpose of combating insects is an "economic poison" and that such mixture is subject to the provisions of the Economic Poisons Act.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

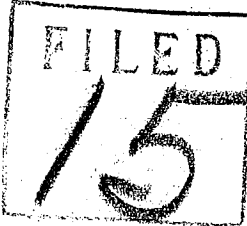
Very truly yours,

John M. Dalton
Attorney General

CEB/ld

STATE PURCHASING AGENT:
MOTOR VEHICLES:

Where a successful bidder contracts with the state to supply new automobiles and agrees to accept as part payment of the purchase price automobiles currently being used by the state the depreciation occasioned by the use of said automobiles in the ordinary course of business should be borne by the bidder.



December 19, 1955

Honorable L. G. Carpenter
Commissioner of Agriculture
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an opinion of this office, which request reads as follows:

"We are faced with a problem of making a determination as to what is fair and honest in connection with a car trade which was made this summer in the Grain Warehouse Division.

"Requests for bids were mailed out by Mr. Nelson on June 10, 1955, and were opened by Mr. Nelson on June 22, 1955, at which time the Bernard Motors Inc. at Lexington, Missouri, was awarded the bid with the understanding that delivery was to be made within ten days. The vehicles being traded in were in constant daily service as it was necessary that they be used in connection with the official grain inspection work.

"Mr. Bernard contends that one of the cars was subjected to abuse and damage between the time that he looked at the car and the time that he was able to deliver the new vehicle and take the old car in exchange. It is entirely possible that in the normal use that there was some further depreciation as some 6 weeks expired between the time the bids were mailed out and the actual completion of the transaction.

"The amount of money involved, of course, is rather insignificant; however, it comes to my mind that there is some question as to the legality of our paying a

Hon. L. C. Carpenter

repair bill on a vehicle on which we no longer hold title. Again may I say that we want to be fair and honest and treat everyone in the manner in which we would want to be treated ourselves. Therefore, we are leaving this determination to you as to the legality and the state's responsibility in this matter."

We understand the facts to be as follows: The Grain Warehouse Division desired to obtain new automobiles to replace those owned and operated by the Division. The State Purchasing Agent secured bids for the purchase of new automobiles to be financed in part by a transfer of certain vehicles operated by the Division. The successful bidder was awarded the contract with the understanding that delivery was to be made within ten days. Actually, some six weeks expired between the time the bids were mailed out and the time delivery was, in fact, made.

You further state that the vehicles owned by the state, and which were transferred to the seller on delivery of the new automobiles, were in constant daily use by the Division. You then inquire whether depreciation or damages occurring in such use should be borne by the state.

The facts outlined above constitute a contract of sale which contract would, of course, be governed by the terms thereof. It may be assumed, for the purpose of this discussion, that the successful bidder (seller) must have known that the vehicles owned by the state would be used in the normal course of business pending delivery of the new vehicles and, therefore, would be presumed to have agreed to accept such vehicles, subject to the usual depreciation occasioned by such use. What would constitute usual depreciation under the particular facts would, of course, be a question of fact upon which we cannot express an opinion.

Of course, if said vehicles sustained abuse and damage other than depreciation in their normal use it might be so great as to prevent the state from fulfilling the terms of the contract. In such event it would appear that the state should, in all fairness, bear such loss. This result would, as above stated, depend upon the particular facts involved and resort must be had thereto.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that where a successful bidder contracts with the state to supply

Hon. L. C. Carpenter

new automobiles, and agrees to accept as part payment of the purchase price automobiles currently being used by the state, the depreciation occasioned by the use of said automobiles in the ordinary course of business should be borne by the bidder.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:mw

REGISTRATION LIST: County clerks of those cities that come within the provisions of Senate Bill 297 have until the last day of October 1955 to complete and file a check of the registration lists in such cities whether such check is made through the United States Post Office Department or by means of canvassers.

COUNTY CLERK:



September 8, 1955

Honorable Richard J. Chamier
Acting Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

Your request for an opinion of this office reads as follows:

"It appears that Chapter 116 of the Revised Statutes of Missouri, 1949, will apply to Moberly in Randolph County, Missouri after August 29, 1955, the effective date for legislation passed by the 1955 general assembly. Section 116.090 provides that the County Clerk shall take certain action no later than the first day of September. It would seem that he would be unable to do what is required of him between the day when this section of the statute applies to this county (August 29) and the day when he is required by the new law to have performed an official duty (September 1). Certain names should be published following the 'careful check of the register list' which the Clerk is required to make and other things are to be done, none of which can apparently be done in this limited time."

Section 116.090, RSMo 1949, which on August 29 by Senate Bill 297 became applicable to all cities containing at least 10,000 population, located in any county not having a provision for registration of voters, reads as follows:

"1. During the year of 1947, and not later than the first day of September, 1947, except as herein provided, and each four years there-

Honorable Richard J. Chamier

after at said time, the clerk of the county court in any county affected by this chapter shall cause a careful check to be made of the registration list. He shall cause each person on said list to be checked as to residence and all other facts bearing on his eligibility as an elector. The said clerk shall conduct such canvass or verification through the United States Post Office Department, furnishing all lists and other information which may be necessary to such department, and he shall cooperate with such department to the end of procuring a verification of every name on the registration records. If in his judgment it shall be necessary to supplement the verification conducted through such department, the county clerk shall make application to the circuit court en banc or to the majority of the judges thereof in vacation for the appointment of canvassers to make such further check of the registration list as may be required and, if in the judgment of the said circuit court or a majority of the judges thereof such further canvass shall be deemed necessary, they shall empower the said county clerk to employ the necessary canvassers requested by him on such terms and at such compensation as may be fixed by said circuit court or judges. The said canvassers shall be resident electors of said county, of good repute and character, not in public employ in any such county, and no person shall be named as a canvasser who is at such time a candidate for public office or a member of a family of any candidate. Any such canvass or verification conducted through the United States Post Office Department or by means of canvassers appointed by the county clerk shall be completed and the report thereof filed in the office of said county clerk not later than the last day of October in such year. On or before the first day of November the county clerk of any such county shall cause to be published in the daily newspaper of the largest circulation in said county a list of the names of all persons not found to reside at the address given in the registration records for such

Honorable Richard J. Chamier

persons or otherwise found to be improperly registered under the terms of this chapter. The county clerk shall give notice in such publication that unless any person listed therein appears at the office of the county clerk within thirty days of the date of such publication and makes proper proof of his eligibility as a registered elector in the city his name will be stricken from the registration list. The county clerk shall be empowered to make such revision of the registration records as may be necessary to conform to the results of such registration canvass or verification and shall strike from said records the names of all persons found to be improperly registered. If it shall be necessary to appoint canvassers to supplement the verification through the post office department as herein provided for, the county clerk shall supply to each such canvasser a list of names or other data relating to the registration records requiring verification. Each such canvasser shall make a diligent check of all names supplied to him by the county clerk, calling at the residence given for each such elector. After completing the canvass each such canvasser shall file a report in the office of the county clerk listing the names and addresses of all persons who are not found to reside at the address given in the registration record or otherwise found to be improperly registered and shall file with the said report an affidavit which shall be in substantially the following form:

* * * * * (Form omitted)

"2. The foregoing affidavit shall be sworn to by the canvasser before the county clerk or one of his deputies before such canvasser shall receive compensation for his services. In cases where cities affected by this chapter have completed a first general registration under this chapter within four years next preceding the year 1947, the check of

Honorable Richard J. Chamier

the registration list herein required shall be made during the fourth year following the beginning of said general registration, and not later than the first day of September in said year, and each four years thereafter at said time." (Emphasis ours)

Even though this bill did not become law until August 29, the Clerk of the County Court is required by the above section to make a careful check of the registration lists by September 1, 1955. Such check shall be made by checking the residence of each person on such list and such canvass or verification of the registration list shall be conducted by the County Clerk through the United States Post Office Department in accordance with the above cited section. But as the above cited section states if in the judgment of the County Clerk, it shall be necessary to supplement the verification conducted through such department, the county clerk shall make application to the circuit court en banc or to the majority of the judges thereof in vacation for the appointment of canvassers to make such further check of the registration list as may be required and, if in the judgment of the said circuit court or a majority of the judges thereof such further canvass shall be deemed necessary, they shall empower the said county clerk to employ the necessary canvassers requested by him on such terms and at such compensation as may be fixed by said circuit court or judges. The said canvassers shall be resident electors of said county, of good repute and character, not in public employ in any such county, and no person shall be named as canvasser who is at such time a candidate for public office or a member of a family of any candidate. Any such canvass or verification conducted through the United States Post Office Department or by means of canvassers appointed by the county clerk shall be completed and the report thereof filed in the office of said county clerk not later than the last day of October in such year.

Thus, the county clerk has until the last day of October to complete and file the report of the canvass and verification conducted by him through the United States Post Office or by means of canvassers.

Also, it is the opinion of this office that a reasonable time is to be allowed a county clerk within which to perform the duties set out in Section 116.090.

CONCLUSION

Honorable Richard J. Chamier

It is the opinion of this office that the county clerk in those cities that come within the provisions of Senate Bill 297 must make a complete check of the registration lists. Such canvass or verification shall be conducted through the United States Post Office Department. But if in the judgment of the county clerk it shall be necessary to supplement the verification of such department, the county clerk has the power to apply to the circuit court en banc or to the majority of the judges thereof in vacation for the appointment of canvassers to make such further check of the registration list as may be required.

The county clerk has until the last day of October to complete the check of the registration lists and to file his report whether such check is made through the United States Post Office Department or by means of canvassers appointed under Section 116.090. Also it is the opinion of this office that the county clerk shall have under all circumstances a reasonable time to complete his check and verification of the registration lists.

The foregoing opinion, which I hereby approve, was written by my assistant Harold L. Volkmer.

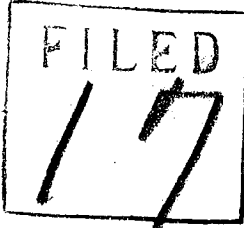
Yours very truly

John M. Dalton
Attorney General

HLV:lc

GOVERNOR:
TERM OF OFFICE:

The term of the Governor of Missouri begins on the second Monday in January following his election, and continues for a term of four years and until a successor is elected and qualified.



October 6, 1955

Honorable John R. Clark
Representative, 6th District
Jackson County
3923 Holmes
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I have been asked by one of our citizens in Kansas City, Missouri, to write you and request an official opinion on the following matter.

"When does the term of office of the Governor of Missouri commence and when does it end."

In this regard we direct your attention to Section 111.090 RSMo 1949, which reads:

"1. On the first Tuesday after the first Monday in November, in the year 1948, and every four years thereafter, there shall be an election held in each township in this state, and in each ward of the city of St. Louis, for the election of governor, lieutenant governor, secretary of state, state treasurer and attorney general, who shall hold their offices for the term of four years after the second Monday in January next after their election, and until their successors are elected and qualified.

"2. The state auditor shall be elected for a term of two years at the general election in the year 1948, and his successors shall be elected for terms of four years. The state auditor shall hold his office for a term commencing after the second Monday in January next after his election, and until his successor is elected and qualified."

Honorable John R. Clark

Section 12, of Article VII, of the Constitution of Missouri, provides that "except as provided in this constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

In view of Section 111.090, supra, and Section 12, of Article VII, of the Constitution of Missouri, supra, it appears that the term of the Governor of Missouri begins on the second Monday in January following his election, and continues for a term of four years, and until a successor is elected and qualified.

CONCLUSION

It is the opinion of this department that the term of the Governor of Missouri begins on the second Monday in January following his election, and continues for a term of four years and until a successor is elected and qualified.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

COUNTY COURTS:
ELECTRICAL COOPERATIVES:
RIGHT OF WAY:

(1) An electrical cooperative which maintains poles and lines on public right of way along present roads which are to be widened, but which are not within the state highway system, must remove and relocate such poles and lines on order from the county court or county highway engineer; and the electrical co-

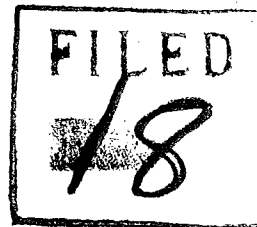
operative must bear the expense of such removal and relocation.

(2) An electrical cooperative which maintains poles and lines on private property along present roads which are to be widened does not have to remove and relocate the poles and lines unless and until the county or state acquires the cooperative's vested interests by way of easement in the private property either by purchase or by condemnation.

September 19, 1955

FILED 18

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Sir:

Your request for an opinion reads as follows:

"In order to build and construct roads under its ten-year road program the State Highway Department has asked that R.E.A. lines and poles maintained along right-of-way of present roads be removed, even though some of the poles are on private property.

"The County of Cedar and R.E.A. entered into an agreement, evidenced by Court Order, a copy of which is enclosed.

"Would you please give me your opinion under Sections 394.080-393.010 - and 229.100 R.S.Mo. 1949, and any other applicable sections; whether or not the said agreement as entered into by Cedar County and R.E.A. now requires R.E.A. to remove these poles and lines at their expense, and in your opinion does 'along public roads' as now in the agreement, include the poles near present roads, even though on private property, if they would interfere with the new roads under the ten-year program; and if so, are the provisions of the agreement shown in the Court Order constitutional and lawful?

Honorable Joe Collins

"Would you please mail me two copies of your opinion.* * *"

You also stated in a telephone conversation with this office on the 29th, that the roads referred to in your request are not now a part of the state highway system, but were to be widened and then become a part of the state highway system by the State Highway Commission taking control over them. You also stated that they were to be widened by the acquisition of right of way and the cost of such right of way was to be borne by the county or someone else not specified who would purchase it and then deed it over to the State Highway Commission. You further stated that some of the electrical cooperative's poles and lines are now on public right of way along these roads and some are on private property, which private property will later be acquired and be a public right of way.

Your questions then were, one, whether these poles and lines along the public right of way and along the private property have to be moved by the electrical cooperative, and second, who is to bear the expense of moving and relocating these poles and lines?

Subsection 10 of Section 394.080, RSMo 1949, reads as follows:

"Powers of co-operative.--A co-operative shall have power * * *

"(10) To construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including without limitation, all roads, highways, streets, alleys, bridges and causeways, and upon, under and across all publicly owned lands, subject, however, to the requirements in respect of the use of such thoroughfares and lands that are imposed by the respective authorities having jurisdiction thereof upon corporations constructing or operating electric transmission and distribution lines or systems; * * *"

Thus this subsection which authorizes an electrical cooperative to construct and maintain transmission lines along the roads, highways, etc., of the state makes such construction and maintenance subject to the requirements of the authorities having jurisdiction over such roads, highways, etc. Thus it becomes necessary to ascertain which

Honorable Joe Collins

state authority or agency, or political subdivision has jurisdiction over the construction and maintenance of these transmission lines along the roads referred to in your request. In State v. Kansas City Power and Light Company, 105 S.W. 2d 1085, the Kansas City Court of Appeals stated at page 1088:

"(7) The opinion does not hold either directly or inferentially that there is conflict 'in the authority of two separate state agencies.' The authority of county courts and highway engineers is by section 7924 limited to public roads which are not a part of the state highway system. The authority of the state highway commission, in so far as the location of the lines of utilities is concerned, is limited by section 8109 to roads which are a part of the state highway system. There is no conflict in the authority of those agencies."
(Emphasis supplied.)

Thus as you state in your request these roads are not at present within the state highway system. The county has jurisdiction over the construction and maintenance of lines, poles and fixtures along such roads which are on the public right of way. This jurisdiction of the county is set out in Section 229.100, RSMo 1949, which states as follows:

"No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on under or across the public roads or highways of any county of this state, without first having obtained the assent of the county court of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county court."

This jurisdiction was exercised by the county when it authorized the electrical cooperative to establish and maintain lines and poles along the roads. Cedar County, by the county

Honorable Joe Collins

court, in exercising such jurisdiction attached conditions to such maintenance of poles and lines along the roads of Cedar County. These conditions are set out in the order by the Cedar County Court which authorizes the electrical cooperative to erect and maintain lines and poles in Cedar County. The conditions are:

"* * * Provided such lines and fixtures and appurtenances thereto shall not be so placed, constructed or maintained as to obstruct the use of roads or highways for travel, and shall not be so placed, constructed or maintained as to interfere with the maintenance and repair of such roads or highways or the construction of additional roads or highways, or the natural flow of waters: and provided further that no poles shall be erected under such reasonable rules and regulations as may be prescribed and promulgated by the County Highway Engineer with the approval of the County Court."

One of the conditions set out in the order by the Cedar County Court was that lines, fixtures, and appurtenances shall not be placed, constructed, or maintained so as to interfere with the maintenance and repair of such roads or highways. It is the belief of this office that the widening of a highway comes within the terms of maintenance and repair of such roads or highways. Thus, it would seem that when these poles, lines and fixtures are on public right of way, and they would obstruct the widening of the highway then in accordance with the order by the Cedar County Court the electrical cooperative must remove these poles and lines so as not to obstruct the widening of the road. Thus it is the opinion of this office that the electrical cooperative must remove and relocate these poles, lines and fixtures which are on the public right of way along present roads, which roads are not a part of the state highway system, in accordance with the conditions set out in the order of the Cedar County Court. And the electrical cooperative must remove and relocate such poles and lines which are on public right of way along roads within Cedar County which are not part of the state highway system when such removal and relocation is necessary for the widening of the aforesaid roads, when ordered to do so by the county court or county highway engineer. Since the electrical cooperative is obligated by the conditions in the order made by the Cedar County Court to remove and relocate poles, lines and fixtures

Honorable Joe Collins

it seems logically to follow that the electrical cooperative must bear the expense of removing and relocating such poles and lines and fixtures which are on public right of way.

The next question is must the electrical cooperative remove and relocate its poles which are on private property, which private property will later become public right of way along present roads within or without the state highway system. Since the electrical cooperative has an easement, whether oral or written, in the private property on which its poles and lines stand it has a vested interest in the private property and the electrical cooperative is not required to remove the poles and lines unless and until the county or state acquires this vested interest of the cooperative in the property, either by purchase or condemnation.

CONCLUSION

It is the opinion of this office that:

(1) An electrical cooperative which maintains poles and lines on public right of way along present roads which are to be widened, but which are not within the state highway system, must remove and relocate such poles and lines on order from the county court or county highway engineer; and the electrical cooperative must bear the expense of such removal and relocation; and,

(2) An electrical cooperative which maintains poles and lines on private property along present roads which are to be widened does not have to remove and relocate the poles and lines unless and until the county or state acquires the cooperative's vested interests by way of easement in the private property either by purchase or by condemnation.

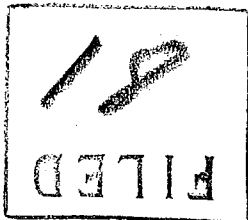
The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

Yours very truly,

John M. Dalton
Attorney General

COUNTY ASSESSORS:
COUNTY COURT:
BONDS:

The county court of a fourth class county must pay for the premium on the county assessor's surety bond.



October 13, 1955

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"Our County court refused payment of Assessor's Surety Bond premium.

"Would you please advise if the County Court must pay premium on Assessor's bond in 4th class counties?"

Section 53.040, RSMo 1949, reads as follows:

"Every assessor (except the assessor of St. Louis city) before entering upon the duties of his office, shall give a surety company bond in a sum of not less than one thousand dollars, to be paid by the county or township, the amount to be fixed by the court or clerk, as the case may require, conditioned for the faithful performance of the duties of his office, which bond shall be deposited in the office of the clerk of the county court." (Emphasis supplied.)

By this section a county assessor of a fourth class county must give a surety company bond before entering upon the duties of his office. The sum of the bond is to be not less than one

Honorable Joe Collins

thousand dollars and the amount is to be fixed by the county court or by the county clerk. As to who shall pay for the bond, it is stated in this section: "to be paid by the county or township." Cedar County, not being a county organized under township organization, must by this section pay for the surety bond that the county assessor must give and thus, the county court must pay the premium on the county assessor's bond.

CONCLUSION

It is the opinion of this office that the county court of a fourth class county must pay for the premium on the county assessor's surety bond.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

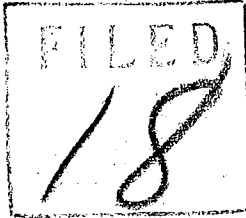
Yours very truly,

John M. Dalton
Attorney General

HLV:vlw

MILEAGE:
SHERIFFS:
STATE HOSPITALS:

In taking a patient or patients to or from a state hospital, the sheriff is only entitled to mileage for miles actually traveled.



November 8, 1955

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Our County Court made an order that the Sheriff transport one Paul James Chambers from Stockton, Cedar County to Marshall State School.

"The court also made an order that our Sheriff receive one Harvey Fitch, Jr. who was then a patient in the Marshall State School at Marshall, Missouri and transport him to State Hospital No. 3 at Nevada, Missouri.

"The Sheriff made one trip from Stockton, Missouri with a guard and delivered Paul James Chambers to the Marshall State School at which time he also received Harvey Fitch, Jr. from the Marshall State School and delivered him to State Hospital No. 3 at Nevada, Missouri, after which the Sheriff returned to Stockton, Missouri.

"As to Paul James Chambers the Sheriff billed the County for mileage from Stockton, Missouri to Marshall State School and return 292 miles.

"As to Harvey Fitch, Jr. the Sheriff billed the County for mileage from Stockton to the State School at Marshall to Nevada, Missouri to Stockton, Missouri-364 miles. The county Court allowed the mileage on the one trip of

Honorable Joe Collins

364 miles which was the distance covered by the Sheriff in the one trip he made delivering each party.

"Would you please advise if the actual miles traveled 364 miles is the proper mileage or was the Sheriff correct in billing the County for mileage in each case as it was separate cases and separate Court order."

In this regard we direct your attention to Section 202.630 RSMo 1949. This section refers to the power of the Superintendent of the Missouri State School at Marshall. Paragraph 2 of this section reads as follows:

"If any patient becomes dangerously insane, and be so certified by the superintendent, he shall be transferred and placed in the state hospital located nearest to the county from which said patient was sent. The expense of transfer to said hospital to be paid for by the county from whence said patient came."

Under the above, the sheriff is authorized to go from Stockton to Marshall, pick up an inmate of the Missouri State School there, transport him to the State Hospital at Nevada, go from Nevada to Stockton, and collect mileage for the miles actually traveled in going from Stockton to Marshall, Marshall to Nevada, Nevada to Stockton, which you estimate at 364 miles. We do not believe that the sheriff would be allowed any extra mileage for transporting the patient from Stockton to the Missouri State School at Marshall.

On October 11, 1937, this department rendered an opinion, a copy of which is enclosed, to Leo A. Politte, Prosecuting Attorney of Franklin County, in which we stated:

"Therefore, the mileage given him by statute is to compensate him for the trip, and if he takes more than one patient the expenses incurred by him would probably be the same. The intentions of the Legislature may be gleaned from the wording of the statute itself, because it allows \$1.00 per day 'to the support of each patient,' the Legislature must have taken into consideration those instances when the sheriff would take more than one patient, and while they allowed him only ten cents per mile for mileage, still they allow a dollar per day for each patient."

Honorable Joe Collins

On August 8, 1936, this department rendered an opinion, a copy of which is enclosed, to O. B. Jennings, Clerk of the Circuit Court of Howell County, in which we held that sheriffs shall be allowed mileage only for miles actually traveled in serving any writ. We believe the above statement of this principle of law to be correct, and applicable to your situation.

CONCLUSION

It is the opinion of this department that in taking a patient or patients to or from a state hospital, the sheriff is only entitled to mileage for miles actually traveled.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

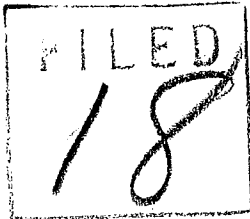
Encs: Opinions to

Leo A. Politte;
O. B. Jennings.

HPW/ld/bi

ASSESSORS:
TOWNSHIP ORGANIZATION
COUNTIES:

In township Organization counties a
township assessor is not required
to give bond.



December 30, 1955

Honorable J. W. Colley
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Will you please advise me if Section 53040
Missouri Revised Statutes 1949 requires a
township assessor to file a bond in the of-
fice of the clerk of the county court.

"Dade County operates under the township
organization as provided in chapter 65
of Missouri Revised Statutes and, as a
result, has some fifteen assessors elected
by the voters of each township of the county.
The County Clerk of this county has asked
me to advise him if it is necessary for these
township assessors to file bond under the sec-
tion first referred to."

Section 53.040, RSMo 1949, to which you refer, reads:

"Every assessor (except the assessor of St. Louis
city) before entering upon the duties of his of-
fice, shall give a surety company bond in a sum
of not less than one thousand dollars, to be paid
by the county or township, the amount to be fixed
by the court or clerk, as the case may require,
conditioned for the faithful performance of the
duties of his office, which bond shall be de-
posited in the office of the clerk of the county
court."

The above, however, applies only to counties not under town-
ship organization, as is shown by Section 137.440, RSMo 1949, which
reads:

Honorable J. W. Colley

"The assessor or some suitable person empowered by him, shall, within the time prescribed by law, and after being furnished with the necessary blanks proceed to take a list of the taxable property of his township and assess the value thereof in accordance with the provisions of the general laws of this state in relation to the assessment of real and tangible personal property by county assessors, in all things pertaining to the discharging of his official duties, except when the same may be inconsistent with the provisions of this chapter; provided, that in counties under township organization the assessor shall not be required to give bond and his compensation shall be such as is provided in section 65.240, RSMo 1949 for his services." (Emphasis ours.)

From the above, it will be seen that a township assessor is not required to give bond, which fact answers your question.

CONCLUSION

It is the opinion of this department that in township organization counties a township assessor is not required to give bond.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

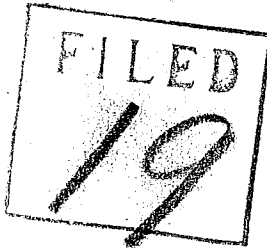
Very truly yours,

John M. Dalton
Attorney General

HPW/ld

COUNTY PURCHASES: In second class county, court has discretion in determining whether or not annual purchases need be advertised. Contracts for repair of road machinery under certain circumstances need not be let on competitive bidding.

COUNTY BUDGET LAW:



January 27, 1955

Mr. Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We have received your requests for two opinions of this office on matters relative to purchases by Buchanan County, which is a county of the second class. Your first question reads as follows:

"This office would like to have your opinion upon the following question:

Is it necessary, according to Section 50.660 R.S. Mo., 1949, and 50.760 R.S. Mo., 1949, for an office holder or the county to request bids for the purchase of some item which is supplied by only one supplier?

"An example of the above situation would be the purchase of a set of the United States Code Annotated, Title 18, a set of Martindale-Hubbell, or film to be used by the County Recorder which is supplied only by the manufacturer of the machine.

"In the past we have posted bids even though we knew there was only one person who would be able to supply the article needed. In the event the amount was in excess of \$500.00, it necessitated newspaper advertising which cost the county money. Since this seems to be a useless act, I am wondering if it is necessary."

Mr. Frank D. Connett, Jr.

The pertinent portions of Section 50.660, RSMo 1949, read as follows:

"All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment, or services other than personal made by the officer in charge of purchasing in any county having such officer. * * * All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least five hundred copies per issue, if there be such, except that such advertising shall not be required in case of contracts or purchases involving an expenditure of less than five hundred dollars, in which case notice shall be posted on the bulletin board in the courthouse; provided, however, that it shall not be necessary to obtain bids, as herein provided, on any purchase or purchases, in the amount of twenty-five dollars or less, made from any one person, firm or corporation during any period of thirty days. All bids for any contract or purchase may be rejected and new bids advertised for. Contracts which provide that the person contracting with the county shall, during the term of the contract, furnish to the county at the price therein specified the supplies, materials, equipment, or services other than personal therein described, in such quantities as may be required, and from time to time as ordered by the officer in charge of purchasing during the term of the contract, need not bear the certification of the accounting officer, as herein provided; but all orders for such supplies, materials, equipment, or services other than personal shall bear such certification.

Mr. Frank D. Connett, Jr.

In case of such contract, no financial obligation shall accrue against the county until such supplies, materials, equipment or services other than personal are so ordered and such certificate furnished."

Section 50.760, RSMo 1949, reads as follows:

"It shall be the duty of the judges of the county court in all counties of the second class, or on before the first day of February of each year, to determine the kind and quantity of supplies, including any advertising or printing which the county may be required to do, required by law to be paid for out of the county funds, that will be necessary for the use of the several officers of such county during the current year, and to advertise for sealed bids and contract with the lowest and best bidder for such supplies. Before letting any such contract or contracts the court shall cause notice that it will receive sealed bids for such supplies, to be given by advertisement in some daily newspaper of general circulation published in the county, such notice to be published on Thursday of each week for three consecutive weeks, the last insertion of which shall not be less than ten days before the date in said advertisement fixed for the letting of such contract or contracts, which shall be let on the first Monday in March, or on such other day and date as the court may fix between the first Monday of March and the first Saturday after the second Monday in March next following the publication of such notice; provided, that if by the nature or quantity of any article or thing needed for any county officer in any county of this state to which sections 50.760 to 50.790 apply, the same may not be included in such contract at a saving to such county, then such article or thing may be purchased for such officer upon an order of the county court first being made and entered as provided in sections 50.760 to 50.790; and

Mr. Frank D. Connett, Jr.

provided further, that if any supplies not included in such contract be required by any such officer or if the supplies included in such contract be exhausted then such article or thing may be purchased for such officer upon order of the county court first being made and entered of record as provided in sections 50.760 to 50.790."

Section 50.770, RSMo 1949, reads as follows:

"The word 'supplies,' as used in sections 50.760 to 50.790 shall be held and construed to include every article or thing for which payment may by law be required to be made by the county, and including advertising and printing required to be done by the county."

These statutes appear to deal with the same subject matter but on their face contain some apparently conflicting provisions. Section 50.660 requires advertisement in newspaper of contracts involving purchases of over five hundred dollars. Section 50.760 requires advertisement without reference to the amount involved. Section 50.760, in view of its provision regarding the omission of items which may not be included in the contract at a saving to the county, apparently vests some discretion in the county court to determine which items should be submitted to bids. Section 50.660 is inflexible in its term. It was so construed in the case of Layne-Western Co. v. Buchanan County, Mo., 85 F. (2d) 343. In that case the court, in discussing what is now Section 50.660, stated, 75 F. (2d) 1.c. 347:

" * * * The statute in the instant case, however, provides that 'all contracts and purchases' shall be let after competitive bidding. It would be hard to imagine a more inclusive statute. * * *"

The answer to your question appears to us to depend upon a resolution of the conflicting provisions of these two sections. Both were passed at the same session of the General Assembly. What is now Section 50.660 is originally found in Laws of 1933, page 340, and what is now Section 50.760 originally appeared in Laws of 1933, at page 201. Being in pari materia they should be construed together, if possible, in order to effectuate the intention of the Legislature.

Mr. Frank D. Connett, Jr.

It appears to us that Section 50.760 has reference to recurrent items of annual expenditure which are required by the various county officers and which may by pooling purchases be obtained at advantageous prices to the county.

It would appear to us to include the ordinarily foreseeable items to be used by the various county officials in the conduct of their offices. The items referred to in your opinion request seem to us to be such as would be ordinarily foreseeable to be required in the course of the year and would be required to be purchased from year to year. They are items which could and should be submitted to the county court in the annual budget request for the offices involved. Therefore, they would appear to us to fall within the provisions of Section 50.760.

Falling under provisions of this section, we are of the opinion that, in view of the provision found therein, "that if by the nature or quantity of any article or thing needed * * * the same may not be included in such contract at a saving to such county," the county court is afforded some measure of discretion in determining whether or not the particular items should be included in those advertised. If the court can say with certainty that by virtue of the fact that such items are obtainable from only one supplier and therefore could not be included in the annual contract at a saving to the county, then we believe that direct purchases, without competitive bidding, may be made by compliance with the provisions of Section 50.780, RSMo 1949. It does not appear to us that, as to such items, upon the court's determination that advertising is not required under Section 50.760, advertisements and bids would then be required in accordance with Section 50.660. So to hold would render the portion of Section 50.760 conferring discretion upon the county court meaningless.

Your second question is as follows:

"It is my interpretation of Section 50.660 R.S.Mo., 1949, that the county or county officers do not have to advertise or take bids on contracts for personal services.

"Assuming that to be correct, would the repair of a single item of county equipment, such as highway department machinery in instances where the repair must be done by the manufacturer or is of such a nature that it would be impossible to ascertain in advance the amount of time or what parts would be needed to do the repair, be a

Mr. Frank D. Connett, Jr.

personal service for which the county might contract without taking bids."

The general rule regarding the application of statutory provisions such as this to contracts involving personal services is stated in 43 Am. Jur., Public Works and Contracts, Section 28, page 770, as follows:

"As a general rule, statutory and constitutional provisions prohibiting letting of contracts by a state or by municipal subdivisions, without first advertising for bids, do not apply to contracts for professional services, such as the services of physicians or attorneys, or to contracts requiring special training and skill, such as contracts calling for the services of architects, engineers, accountants, or the like, and such contracts may be let without bids. * * *"

It appears to us that this principle would be applicable to the question presented by you. The submission to bids of a contract for the repair of road machinery, when it was unknown as to the nature of the repairs required, would seem to be a futile requirement. No one would be in a position to bid on the job at a gross price without knowing the nature of the repairs required to be made and any attempt to let the contract on the basis of an hourly figure for labor plus necessary parts would be a hit-or-miss matter insofar as a saving to the county is concerned. There would certainly be no way of determining whether or not a person who would make the lowest hourly bid would be able actually to complete the contract at a lesser cost than the person who might be more experienced in making repairs on the machinery yet make a bid at a higher hourly rate. Therefore, we are of the opinion that advertisement would not be required under the circumstances set forth in your letter.

CONCLUSION

Therefore, it is the opinion of this office that in a county of the second class the county court, under the provisions of Section 50.760, RSMo 1949, has some discretion in determining whether or not items of annual recurring expense should be submitted to bids upon public advertisement and that if the county court determines that by reason of the fact that such items are

Mr. Frank D. Connett, Jr.

obtainable at only a single source of supply, and therefore could not be included in the annual contract at a saving to the county, inclusion therein is not required and such items may be purchased directly in accordance with Section 50.780, RSMo 1949. We are further of the opinion that Section 50.660, RSMo 1949, does not require the advertisement and the letting of a contract on competitive bids for the repair of highway department machinery where the repair must be done by the manufacturer or is of such a nature that it would be impossible to ascertain in advance the amount of time or parts needed to do the repair.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

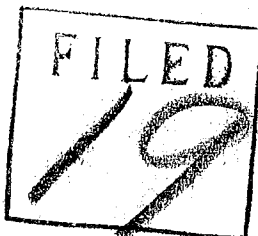
Yours very truly,

JOHN M. DALTON
Attorney General

RRw:ml

COUNTY TREASURERS:

County treasurer may require claimant of fees taxed as criminal costs to make satisfactory proof that such claimant is not indebted to the state or county for any of the items enumerated in Section 550.270, RSMo 1949, before disbursing fees to such claimant.



February 1, 1955

Honorable Noel Cox
State Senate of Missouri
Senate Post Office
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department based upon the following inquiry:

"Section 550.270 makes it a penalty for the County Treasurer to pay juror or witness fees to anyone having judgments or back taxes against them. I would like to know what the duties of the Circuit Clerk, Clerk of Magistrate Court and the Collector of Revenue toward this. Should they furnish the Treasurer with a list of judgments and delinquent taxes or is the duty of the Treasurer to go search their records to find these things? I have been unable to find anything in regard to this. If you could give me your opinion in regard to this matter it sure would be greatly appreciated."

Section 550.270, RSMo 1949, referred to in the letter of inquiry, reads as follows:

"The county treasurers shall pay out all such fees to the proper owners as the same may be called for; provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he

Honorable Noel Cox

or she, as the case may be, is not at the time indebted to the state or county, on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances or costs for a violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office; provided further, that after deducting the amount of the indebtedness of the claimant, if any, on account of any or all of the various causes herein enumerated, the treasurer shall pay him the balance, giving duplicate receipts for the separate amounts paid, one of which shall be filed with the county clerk, who shall charge the treasurer with the same, but if the indebtedness of the claimant equals or exceeds the amount of his fees, the treasurer shall give him credit for the amount of his fees, stating on what account, and shall make duplicate receipts for the same, one of which he shall deliver to the claimant and the other he shall file with the county clerk, who shall charge the treasurer with all such receipts, and in his regular settlements with the county court the treasurer shall make a full and complete exhibit of all his acts and doings under sections 550.260 to 550.300." (Emphasis ours.)

It is clear that through the enactment of this statute the General Assembly intended to provide a method for the coercive payment of indebtedness due or owing the state or county by persons claiming fees in criminal cases. Such coercive payment is, of course, limited to the items enumerated in the statutes consisting of delinquent back taxes, fines, penalties, forfeitures, forfeited recognizances, criminal costs, contempt of court, or indebtedness arising by reason of public moneys in the hands of the claimant by virtue of being a public officer.

Honorable Noel Cox

It is true that the statute does not outline the procedure to be followed precisely by the county treasurer in assuring himself that such claimant is not so indebted. We have examined statutes relating to officials who might or could have some connection with the collection of the items enumerated, and do not find that any of such statutes require such officials to certify facts relating thereto to the county treasurer. However, we do believe that the provision in the statute requiring claimants to furnish "satisfactory evidence" to the treasurer that such claimant is not so indebted affords a measure of protection to the county treasurer insofar as his liability upon his official bond may be concerned. We believe that under the clear wording of the statute the county treasurer may reasonably require a reasonable amount of proof that such indebtedness does not, in fact, exist. We believe that among such reasonable requirements might be one that the claimant submit to the county treasurer a sworn statement reciting that such claimant is not so indebted.

If such statement be made wilfully, and knowing the same to be false, it would serve as the basis for a criminal prosecution of the claimant. We believe that the threat of such prosecution would serve as an effective deterrent against the collection of fees not rightfully due. We further believe that by proceeding in this manner the county treasurer would relieve himself of liability upon his official bond, because it certainly could not be said that he had not acted in a careful and prudent manner to safeguard the rights of the state and county.

CONCLUSION

In the premises, we are of the opinion that a county treasurer may reasonably require evidence of the non-indebtedness to the state or county based upon any of the items enumerated in Section 550.270, RSMo 1949, of any person claiming fees payable as criminal costs.

We are further of the opinion that if such required evidence is of a quantum to satisfy a reasonably prudent man that no such indebtedness does in fact exist, that such county treasurer would thereby be relieved of liability upon his official bond arising by virtue of having made payment of such claim to a person who in fact was not lawfully entitled thereto.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

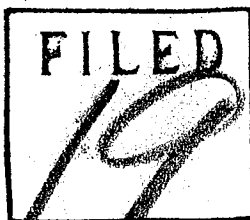
Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

OLD AGE ASSISTANCE:
REAL PROPERTY:
DEED:

Eligibility of applicants for old age assistance and recipients to continue to receive benefits under State Social Security Act governed by provisions of said Act and not by decision rendered in St. Louis County National Bank vs. Fielder, 260 S.W.2d 483.



March 23, 1955

Honorable Noel Cox
Missouri State Senate
State Capitol Building
Jefferson City, Missouri

Dear Senator Cox:

This will acknowledge receipt of your recent request for an opinion as to whether an old age pensioner may now dispose of his property by deed without violating the rule laid down by the State Social Security Commission in view of the decision rendered in St. Louis County National Bank vs. Fielder, 260 S.W.2d 483.

We have read that decision, which merely provides that a conveyance was made by deed, even though it may only convey a defeasible fee, when subject to grantor retaining the right and power to sell, rent, mortgage, lease or otherwise dispose of same; that the present trend is to hold such conveyance by deed with such reservations, valid, and upon termination of the life estate of the grantor where the power to revoke was not exercised, the grantee becomes absolute owner.

The foregoing decision does not hold that there was any consideration given for executing such a conveyance. This may be important, in view of the provisions of Section 208.010, RSMo Cum. Supp. 1953, which disqualifies an applicant or recipient who disposes of property without a consideration in order to qualify for benefits thereunder.

We are unable to find any rule of said commission or the Division of Welfare of the Department of Public Health and Welfare, successors in office to the State Social Security Commission, relative to the transfer of such property other than when such property is considered by such body as a resource. However, Section 208.010, RSMo Cum. Supp. 1953, is pertinent to your request and is probably the statute you refer to in this instance. It reads, in part:

Honorable Noel Cox

"In determining the eligibility of a claimant for public assistance under this law, it shall be the duty of the division of welfare to consider and take into account all facts and circumstances surrounding the claimant, including his earning capacity, income and resources, from whatever source received, and if from all the facts and circumstances the claimant is not found to be in need, assistance shall be denied. The amount of benefits when added to all other income, resources, support and maintenance shall provide such persons with reasonable subsistence compatible with decency and health in accordance with standards developed by the division of welfare. In determining the need of a claimant in federally aided programs, such amounts per month of earned income shall be disregarded in making such determination as shall be required for federal participation by the provisions of the Federal Social Security Act (42 USCA 301 et seq.), or any amendments thereto. Irregular, casual, and unpredictable income received by a claimant from performing odd jobs shall be excluded in calculating income. Benefits shall not be payable to any person who:

"(1) Has made, or whose spouse has made, a voluntary assignment, conveyance or transfer of property within five years for the purpose of rendering himself or spouse eligible for benefits or for the purpose of increasing his or their need for benefits. Any person who has assigned, conveyed or transferred property without receiving fair and valuable consideration therefor within five years preceding the date of the investigation shall be presumed to have made such assignment, conveyance or transfer for the purpose of rendering himself or spouse eligible for benefits or to increase his or their need for benefits. 'Fair and valuable

Honorable Noel Cox

consideration' as used herein shall not, for the purpose of this section, be construed to include past support, contributions or services rendered by a relative to a claimant;

"(2) Owns or possesses cash or securities in the sum of five hundred dollars or more; provided, however, that if such person is married and not separated from spouse, he or they, individually or jointly, may own cash and securities of a total value of one thousand dollars; and provided, further, that in the case of an aid to dependent children claimant the provisions of this subsection shall apply only to the cash and securities owned by the parent and child or children, who may own cash and securities of a total amount not to exceed one thousand dollars, and not to other relatives with whom the child may reside;

"(3) Owns or possesses property of any kind or character, or has an interest in property, the value of which, as determined by the division of welfare, exceeds five thousand dollars, or if married and actually living with husband or wife, if the value of his or her property, or the value of his or her interest in property, together with that of such husband or wife, exceeds said amount; provided, however, that in the case of an aid to dependent children claimant this limitation shall apply only to property owned by parent and child or children and not to other relatives with whom the child may reside;

* * * * *

"(5) Has earning capacity, income, or resources, whether such income or resources is received from some other person or persons, gifts or otherwise, sufficient to meet his needs for a reasonable subsistence compatible with decency and health."

Honorable Noel Cox

Your request is very general and does not relate to any specific set of facts which, if we had, would be much easier to pass upon.

At the moment we can think of certain instances wherein such a conveyance might not in any manner affect the rights of a recipient to old age assistance; however, in many other instances it might affect their right to receive such benefits.

The decision referred to, namely, St. Louis County National Bank v. Fielder, supra, was not based on any provision of the State Social Security Act, and Section 208.010, supra, was not taken into consideration in rendering the same. Had the grantor therein been an old age recipient there would be no question under said decision as to his right to convey said property as provided therein, and it would have been a conveyance of a defeasible fee, but that decision does not settle any question as to whether or not in so doing he would have disqualified himself to longer remain upon the old age assistance roll or receive benefits thereunder. In other words, the decision in no way finally determines the grantor's qualifications to receive benefits under the State Social Security Act. That must be determined only from a review of the Act itself.

Under the Act, Section 208.010, supra, clearly disqualifies any applicant or recipient who has made or whose spouse has made a voluntary assignment, conveyance or transfer of property within five years for the purpose of rendering himself or spouse eligible for benefits or for the purpose of increasing their needs for such benefits. Furthermore, any person who has assigned, conveyed or transferred property without receiving a fair and valuable consideration therefor, within five years preceding the date of investigation, shall be presumed to have assigned, conveyed or transferred for the purpose of rendering himself or spouse eligible for benefits or to increase their need for benefits. Said statute further defines "fair and valuable consideration," and provides that it shall not, for the purpose of this section, be construed to include past support, contributions or services rendered by a relative to a claimant.

In the absence of such limitations placed upon applicants or recipients of or for old age assistance benefits, fair and valuable consideration would have an entirely different meaning; even love and affection has been held to be a valuable consideration for such a transfer. However, the appellate courts of

Honorable Noel Cox

this state have repeatedly held that such benefits are merely gratuities given by the legislature and that same may likewise be modified or taken away by the legislature. Howlett v. Social Security Commission, 149 S.W.2d 806, 347 Mo. 784; Hardy v. State Social Security Commission, 187 S.W.2d 520.

Formerly Section 208.010 contained no such restriction on such persons desiring to convey their property, or at least it was very general and provided only that no such persons should dispose of their property in order to qualify or receive increased benefits. The legislature, in order to prevent abuses, has put some teeth in the present law and has defined "fair and valuable consideration" for the purpose of the State Social Security Act, and further added the presumption hereinabove mentioned, that such disposition of property within five years preceding the date of investigation was made for the purpose of rendering himself or spouse eligible for old age assistance or increased grant.

Section 208.010, supra, is more in the nature of a special statute, dealing particularly with conveyances or disposition of their property, as it affects their eligibility for benefits under the State Social Security Act, and does not apply to anyone not applying for benefits or only receiving benefits under said Act. Therefore it is an exception to the rule or any general law normally affecting all persons. Mennemeyer v. Hart, 221 S.W.2d 960, 359 Mo. 423.

In view of the provisions of Section 208.010, supra, we believe the decision referred to in your request is not applicable to conveyances or disposition of property made by applicants for old age assistance or recipients of benefits under the State Social Security Act, for the purpose of determining their eligibility for benefits or increased grants.

CONCLUSION

Therefore, it is the opinion of this department that while applicants for old age assistance and recipients now receiving old age assistance benefits under the State Social Security Act may dispose of their property in accordance with the decision

Honorable Noel Cox

rendered in St. Louis County National Bank v. Fielder, 260 S.W.2d 483, their right to eligibility for such benefits, and to continue to receive same, will be governed by the provisions of Section 208.010, RSMo Cum. Supp. 1953.

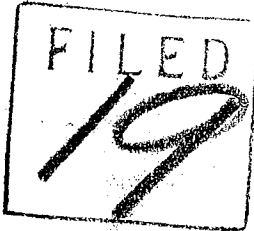
The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH/vtl

PENSION: Claimants and recipients of old age assistance bene-
CONVEYANCE: fits are disqualified to receive benefits when deeding
DEED: property without fair and valuable consideration to
children, with irrevocable instructions to escrow
agent to deliver deed to grantees upon death of grantors.



April 21, 1955

Honorable Noel Cox
Missouri State Senate
Senate Post Office
Capitol Building
Jefferson City, Missouri

Dear Senator Cox:

This will acknowledge receipt of your request for an
opinion, which reads, in part:

"The facts I had in mind are as follows:
An old couple, who have qualified and are
receiving old age assistance, have a num-
ber of children. They desire to prefer
two of the children over the other child-
ren in the final disposition of their real
estate.

"As I understand the law under the ruling
of the State Social Security Commission,
they can do this only by will. At the
death of the survivor of them, this en-
tails administration in Probate Court and
is very expensive. The two questions on
which I would like to have your opinion
are as follows:

"First would it violate the laws of the
State of Missouri if these recipients made
a deed deeding this property outright to
the preferred children, then deliver said
deed to a bank or to some other escrow
agent with irrevocable instructions to
deliver said deed to the grantees at the
death of the grantors, and would it cause
the pensioners to lose their pension?

Honorable Noel Cox

"Second, would these old age pensioners, who are already on the roll, be disqualified and lose their pensions if they made a quit claim deed to the two children, retaining the right to sell, mortgage, rent or otherwise dispose of said property during their lifetime?

* * * * *

You first inquire if recipients of old age assistance benefits under the State Social Security Act would lose benefits thereunder by making an outright deed to their property to preferred children, and deliver it to an escrow agent with irrevocable instructions to deliver said deed to grantees only upon the death of the grantors.

In the case of St. Louis County National Bank v. Fielder, 260 S.W.2d 483, referred to in your request, you will recall the grantors therein retained an interest for life and also reserved the right to mortgage, rent, lease and even convey said property during their lifetime. In view of the foregoing, that decision is hardly applicable in this instance.

In Forester v. Clark, 171 S.W.2d 647, 1.c. 648 (1-3), the court held that the delivery of a deed is essential to its validity; that the grantor must part with the dominion and control of said deed with intent that it take effect presently; that the actual delivery to the grantee need not be made, but to a third party.

In Wilcox v. Coons, 241 S.W.2d 907, 1.c. 912, the court held that when the grantor in a deed retained no dominion or control over said deed and tendered said deed to an attorney to deliver to the grantees upon the death of the grantor, that the delivery was complete when he delivered it to the attorney, and thereafter he could not make any other disposition by subsequent will. In so holding, the court said:

"The contention made under (b), above, is that the fact of the codicil and the making of the two subsequent wills (each prepared by Walden) conclusively establishes Collins' right of recall, and the ending of Walden's authority, if it ever existed.

Honorable Noel Cox

But Walden's testimony, under any construction or view that may be taken of it, was amply sufficient (if believed by the jury, as it was) to warrant a finding that Collins deposited the deed with him with directions to hold it and turn it over to the grantees upon grantor's death, and that in so depositing the deed Collins reserved no dominion or control over the deed, nor any right thereto. In that view, then delivery was complete, so that the grantor could not, by subsequently changing his intention, and by purporting to make other disposition of it by will, affect such prior delivery. Potts v. Patterson, 355 Mo. 154, 157, 195 S.W.2d 454, 456; * * *

See also Potts v. Patterson, et al., 195 S.W.2d 454, Lc.456(13).

Under the foregoing decisions, assuming all other requirements for a valid deed are satisfied, the proposed deed is valid. Grantors and recipients under the State Social Security Act cannot have anything further to do with the property so conveyed, not even to dispose of it by will or subsequent deed.

Section 208.010, RSMo Cum. Supp. 1953, raises a statutory presumption that any person who assigns, conveys or transfers property without receiving a fair and valuable consideration within five years preceding an investigation, shall be presumed to have made such assignment, conveyance or transfer for the purpose of rendering themselves eligible for benefits or to increase their benefits, and said statute furthermore defines "fair and valuable consideration" as follows:

" * * * 'Fair and valuable consideration' as used herein shall not, for the purpose of this section, be construed to include past support, contributions or services rendered by a relative to a claimant; * * "

Therefore, unless these recipients can positively overcome this statutory presumption, then such disposition of said property of itself disqualifies them from longer receiving benefits under said program. While such statute merely raises a presumption that may possibly be overcome by direct and positive evidence to the contrary, this may be difficult to overcome, as persons and courts differ as to its legal effect.

Honorable Noel Cox

Furthermore, as previously shown in our recent opinion rendered to you on a similar request, we made reference to a rule of the Division of Welfare of the Department of Public Health and Welfare, which relates to the disqualification of a claimant or recipient for old age assistance benefits who has an additional property in which he does not reside, until such time as he may sell same and use the proceeds thereof for living expenses, as it is considered a resource under the law. Section 208.010, supra. So if these recipients should deed property of this kind, it is possible that it might disqualify them from such benefits.

In reply to your second inquiry, we believe this was fully covered in our recent opinion rendered to you under date of March 23, 1955.

CONCLUSION

It is the opinion of this department that such disposition of property under facts stated in your first inquiry will possibly result in removing such claimants and recipients from the old age assistance roll, or, if not presently recipients of such benefits, disqualifying them for same.

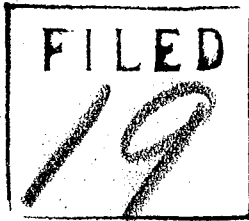
The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARR/vtl

PENSIONS: Claimants and recipients of old age assistance
CONVEYANCE: benefits are disqualified to receive benefits
DEEDS: when deeding property without fair and valuable
consideration.



May 23, 1955

Honorable Noel Cox
Missouri State Senate
State Capitol Building
Jefferson City, Missouri

Dear Senator Cox:

This will acknowledge receipt of your request for an opinion under date of May 9, 1955, alleging that the opinion rendered by this department to you on April 21, 1955, did not fully answer your second question, and you request a specific opinion on it.

I assure you that I certainly thought the first opinion of this department, rendered to you under date of March 23, 1955, would sufficiently answer your second question. We might not have made ourselves clear in the latter opinion on your second question; however, what we intended to convey in the opinion was that said first opinion was applicable, and such a conveyance or transfer by quitclaim deed under the law as written, namely, Section 208.010, MoRS Cum. Supp. 1953, would disqualify these persons for old age assistance for the following reasons, to wit: said statute provides that any person who has assigned, conveyed or transferred property without receiving a fair and valuable consideration therefor, within five years preceding the date of investigation, shall be presumed to have made such assignment, conveyance or transfer for the purpose of rendering himself or spouse eligible for benefits or to increase his or her need for benefits, and in view of the definition of "fair and valuable consideration" therein, that it shall not be construed to include past support, contributions or services rendered by a relative for a claimant.

Honorable Noel Cox

CONCLUSION

Therefore, it is the opinion of this department on the facts stated in your request, such recipient would no longer be qualified to further receive old age assistance.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:vtl:lc

COSEMTOLOGY:
STATE BOARD OF:

The State Board of Cosmetology may not prohibit the employment of both colored and white operators in the same establishment nor prohibit both white and colored persons from patronizing such establishment.



July 13, 1955

State Board of Cosmetology
State Capitol Building
Jefferson City, Missouri

Attention: Miss Jakaline McBrayer
Executive Secretary.

Dear Miss McBrayer:

Reference is made to your request for an official opinion of this office which request reads as follows:

"The Board Members have asked me to write you for an opinion in regard to a beauty shop (which hires) both colored and white operators and who have a clientele of both. Our Kansas City inspector, Mrs. Isabelle Allen had felt that it was sort of dangerous to go into the place to inspect by herself, and Mrs. Pray had said that she would go with Mrs. Allen.

"Frankly, I don't see how our Department can keep them from taking both colored and white trade and hire both colored and white operators, if they themselves are willing to patronize and work in such places, but the Board did want the opinion."

The powers and duties of the State Board of Cosmetology are found in Chapter 329, RSMo 1949. Section 329.180 creates a "State Board of Cosmetology" which Board "shall have control, supervision and enforcement of the terms and provisions of this chapter."

Section 329.210 prescribes the powers of the Board as follows:

State Board of Cosmetology

"The Board shall have power to:

"(1) Prescribe such sanitary rules as it may deem necessary with particular reference to the precaution necessary to be employed to prevent the creating and spreading of infections and contagious diseases, and it shall be unlawful for the owner or manager of any shop or school in any city having a population of more than ten thousand inhabitants to permit any person to sleep in or use for residential purposes any room used wholly or in part as a hairdressing, cosmetological or manicurist's establishment. Licensed operators may practice outside of such establishments under such regulations as the board may provide.

"(2) To conduct examinations of applicants for license to practice, to issue licenses and certificates of registration; and

"(3) To provide for the inspection of shops by licensed cosmetologists as to their sanitary conditions and to appoint the necessary inspectors and, if necessary, examining assistants."

Section 329.140 provides that the Board may revoke or suspend a shop certificate if any shop owner, manager or managers, shall employ any person as a hairdresser, cosmetologist or manicurist who does not have the required license. It follows also that the Board may revoke or suspend a license for violation of sanitary rules promulgated by the Board.

It is of course fundamental that a state officer, board or commission possesses only such powers as are expressly granted or necessarily implied from the express grant of authority. A liberal reading of the provisions of Chapter 329 fails to reveal any power or authority of the board to prohibit colored and white operators from working in the same establishment or to prohibit colored and white persons from patronizing the same establishment. Further, the express grant of control and supervision to the Board over such establishments as noted above would, under the rule, *expressio unius est exclusio alterius*, seem to prohibit

State Board of Cosmetology

any other and broader authority or power.

CONCLUSION

Therefore, it is the opinion of this office that the State Board of Cosmetology may not prohibit the employment of both colored and white operators in the same establishment nor prohibit both white and colored persons from patronizing such establishment.

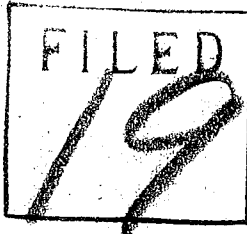
The foregoing opinion, which I hereby approve, was written by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

CRIMINAL LAW:
NARCOTIC DRUG ACT:
HABITUAL CRIMINAL ACT:

Phrase "any subsequent offense" used in Sec. 195.200, RSMo 1949, refers only to offenses defined, charged and found under Chapter 195, RSMo 1949, Missouri's Narcotic Drug Act. Missouri's Habitual Criminal Act, Secs. 556.280 and 556.290, RSMo 1949, covers convictions in Federal courts.



September 8, 1955

Honorable Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

The following opinion is rendered in reply to your request reading as follows:

"We would like to have your opinion on the following proposition.

"I have charged a man, one G. E. "Bud" Fischer, with the violation of Section 195.020 relating to the sale of narcotic drugs. Fischer was previously convicted on January 10, 1955, by the United States District Court, St. Joseph, of a violation of Title 26, United States Code 2554A, relating to the illegal sale of narcotic drugs. He was sentenced to a year and one day, served that sentence, was paroled and discharged.

"My question is this: May I prosecute him under Section 195.200 as if this offense was a subsequent offense so that the punishment will be moved up to two to seven years or may he be tried under Section 556.280, second offense act."

Missouri's Narcotic Drug Act is found at Chapter 195, RSMo 1949. The "penalties" section of such law is Section 195.200, RSMo 1949, which provides:

Honorable Frank D. Connett, Jr.

"Any person violating any provision of this chapter shall be deemed guilty of a felony, and upon conviction thereof shall be punished, for the first offense, by imprisonment in the state penitentiary for a term of two years, or by imprisonment in the county jail for a term of not more than one year or by a fine of not more than one thousand dollars or by both such fine and imprisonment; and for any subsequent offense, by imprisonment in the state penitentiary for a term of not less than two years nor more than seven years, or by a fine of not more than five thousand dollars or less than two hundred and fifty dollars."

With reference to the above, quoted statute it is of interest to note the following comment in relation thereto made by Honorable Roy F. Proffitt, Associate Professor of Law, University of Missouri Law School, in his paper entitled "An Analysis of the Missouri Narcotic Drug Law", Missouri Law Review, Vol. 17 (1952), page 253, l.c. 271:

"The writer has been unable to find a single case in which the penalties now provided by Section 192.200 have been applied."

In the case of Sparkman v. State Prison Custodian, 154 Fla. 688, 18 So. 2d 772, decided by the Supreme Court of Florida in 1944, that State's Uniform Narcotic Drug Law was being reviewed. The "penalties" section of Florida's law read as follows:

"Punishment for violations. Any person violating any provisions of this chapter shall be deemed guilty of a felony and upon conviction be punished, for the first offense, by a fine not exceeding five thousand dollars, or by imprisonment in the state prison for not exceeding five years; and for any subsequent offense, by a fine not exceeding ten thousand dollars, or by imprisonment in the state prison for not exceeding ten years." (Emphasis supplied.)

Honorable Frank D. Connett, Jr.

The similarity between the Florida statute and Section 195.200, RSMo 1949, is evident. At 18 So. 2d 772, 1.c. 773, the Supreme Court of Florida spoke as follows in construing the Florida "penalties" section:

"This statute provides that any person violating any of the provisions of the Uniform Narcotic Law shall be guilty of a felony and upon conviction shall be punished for the first offense by a fine not exceeding five thousand dollars or by imprisonment in the state prison for a period of not exceeding five years; and 'for any subsequent offense' (any person convicted for the second time of any violation of the Narcotic Law) shall be punished by a fine not exceeding ten thousand dollars or by imprisonment for a period of not exceeding ten years in the State Prison."

The Uniform Narcotic Drug Act of Illinois has specifically defined what is a "subsequent offense" within the meaning of such Act, and we find that definition quoted in the case of *People v. Hightower* (1953) 112. N. E. 2d 126, 414 Ill. 537, 1.c. 542, as follows:

"Any offense under this Act shall be deemed a subsequent offense if the violator shall have been previously convicted of a felony under any law of the United States of America, or of any State or Territory or of the District of Columbia relating to narcotic drugs".

Missouri's Narcotic Drug Act does not attempt to define "any subsequent offense" as such language is used in Section 195.200, RSMo 1949, and until the statute is expanded to embrace a definition of "any subsequent offense" to include an offense against the Federal narcotic law, we conclude that the subsequent offense must be one defined, charged and found under Chapter 195, RSMo 1949. It then follows that when one is charged for the first time, and convicted under Chapter 195, RSMo 1949, the added penalties provided in Section 195.200, RSMo 1949, for a "subsequent offense" may not be employed if the person has not had a former conviction under Chapter 195, RSMo 1949.

Honorable Frank D. Connett, Jr.

Your second inquiry goes to the application of penalties set forth in Sections 556.280 and 556.290, RSMo 1949, Missouri's Habitual Criminal Act, under the facts set forth in the request for this opinion. In *State v. Brinkley*, 189 S.W. (2d) 314, 354 Mo. 337, 1.c. 367, the Supreme Court of Missouri spoke as follows:

"Appellant's most sweeping contention is that the habitual criminal statute, Sec. 4855, does not cover prior convictions in the Federal courts but refers only to convictions in a court of another state of the United States. The question seems to be one of first impression in Missouri. The words of the section are, convictions--'in any of the United States, or in any district or territory thereof, or in a foreign country.' The opening phrase of the quoted language undoubtedly does mean, in any of the several states, but it also connotes the Union of States and the government thereof, as indicated by the words next following, 'or in any district or territory thereof.' And these are supplemented by the phrase, 'or in any foreign country.' Certainly the lawmakers did not intend to exclude the courts of the United States though including those of foreign countries with different and unfamiliar laws. We have found no other statute closely resembling ours, but it is all-comprehensive in scope and the language used is more like that found in several states, 'in any other state, government or country.' The authorities are gathered in successive annotations in A. L. R. We overrule the assignment."

CONCLUSION

It is the opinion of this office that penalties prescribed in Section 195.200, RSMo 1949, to be assessed for "any subsequent offense", affect only offenses defined, charged and found under Missouri's Narcotic Drug Act, Chapter 195, RSMo 1949, and do not comprehend offenses against the Federal narcotic law. It is further ruled that Missouri's Habitual Criminal Act, Sections 556.280 and 556.290, RSMo 1949, covers convictions in Federal courts.

Honorable Frank D. Connett, Jr.

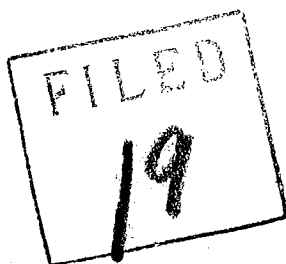
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:gm

PROSECUTING ATTORNEYS: The costs of preparing a transcript to be
COSTS: used in a prohibition proceeding growing
out of a criminal prosecution, provided
such transcript is necessary, would be a
proper county charge and could be paid out
of county funds if proper budgetary require-
ments have been met.



October 17, 1955

Honorable Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

Reference is made to your request for an official opinion of
this office, which request reads as follows:

"This office would like your opinion on the
following problem.

"In May of 1954, we started trial in the case
of State of Missouri vs. Edna Doppler Wisneski.
After the trial had started it was stopped by
a preliminary writ of prohibition from the
Supreme Court. We filed a copy of the tran-
script of the proceedings up to that date with
the Supreme Court. The official court reporter,
Mrs. Helen Milligan, typed up the transcript
and the cost of the transcript, \$30.60, was
taxed as costs; however, this was turned down
by the state when the cost bill went through
early in 1955.

"Mrs. Milligan, the official reporter, has now
presented the county with a bill for \$30.60 for
the cost of this transcript. My question is
this: would it be lawful for Buchanan County
to pay this bill and how would they go about
doing it?"

We understand the facts to be as follows: An application for
writ of prohibition was filed in the Supreme Court seeking to pro-
hibit the circuit court from taking certain action in the case of
State of Missouri v. Edna Doppler Wisneski. The State filed a
copy of the transcript of the proceedings up to that time with the
Supreme Court. The records in the office of the Clerk of the Supreme

Honorable Frank D. Connett, Jr.

Court show that the application for the writ was denied, and the records in the office of the State Comptroller show that the costs incurred in preparing the transcript were as follows: original transcript \$22.95; one copy \$7.65. We further understand that subsequently the defendant was acquitted of the offense charged; that said costs were taxed as costs in the criminal proceeding and disallowed by the State Comptroller. You now inquire whether such costs could be paid by the county.

We believe that it is clear from the facts stated that said transcript was prepared in connection with the prohibition proceeding and, in view of the fact that such proceeding is separate and distinct from the criminal proceeding, we are of the opinion that such item should not be taxed as costs in the criminal proceeding and that the action of the State Comptroller in disallowing the same was proper.

As is stated in the case of State v. Smith, 206 SW2d 558, 1.c. 564, it is a matter of common knowledge that the respondent judge in a prohibition proceeding is represented by counsel for the litigant below who benefited by his rulings and seeks to sustain them. In the instant case, such party would be the State, acting by and through the prosecuting attorney. In view of such fact and assuming (due to lack of information upon which to make a finding) the necessity of preparing a transcript for this particular prohibition proceeding, we are of the opinion that the costs incurred would be proper county charges, necessarily expended by the office of the prosecuting attorney in the discharge of his duties, and could be paid from county funds provided that proper budgetary requirements have been met.

CONCLUSION.

Therefore, it is the opinion of this office that the costs of preparing a transcript to be used in a prohibition proceeding growing out of a criminal prosecution, provided such transcript is necessary, would be a proper county charge and could be paid out of county funds if proper budgetary requirements have been met.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:sm

DEDICATION: Public roads may be established by dedication
PUBLIC ROADS: and acceptance so as to qualify for improve-
KING BILL: ment, construction, etc., under Section 231.460,
COUNTY COURT: RSMo 1949, the King Bill.

FILED

19

October 20, 1955

Honorable Frank D. Connett, Jr.,
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Connett:

This is in response to your request for opinion dated
August 23, 1955, which reads as follows:

"This office would like to have your opinion
on the following problem.

"In the summer of 1949, a man by the name of
Whitman who owned a tract of land in Buchanan
County just outside the limits of the City of
St. Joseph, set up a sub-division by grading
out some roads over an area about the size of
two blocks. In December of 1950, Whitman filed
with the Recorder of Deeds a plat and dedication
of the streets and alleys in this sub-division.

"From then, until recently, various people, on
occasions, drove over these streets when they
came to look at some of the lots for sale by
Whitman. No one used the streets to go any
place other than to look at Whitman's lots be-
cause these roads led to no place else.

"This spring Whitman made an application for the
roads to be graveled by the county under King
Road Bill construction. (Section 231.460 R.S.
Mo.1949). This was approved by the Presiding
Judge of the County Court and the King Bill
project was set up and approved by the state.
The roads were shaped up and ditches cut in by
the county and, under the King Bill contract,
the roads were graveled.

"We now discover there was never any compliance
with Section 228.020 R.S.Mo.1949 for the establish-

Honorable Frank D. Connett, Jr.

ment of public roads.

"Our question is this: was it lawful for the County Court to expend public monies, labor and material on these roads without them ever having been established by the County Court? If it was unlawful, what can be done about it now?

"Should the application for the establishment of such road now be set up or may the county recover the value of its services and materials from Mr. Whitman?

"The case of Hays v. Kansas City, 242 S.W. 411-13, is what has led us to believe that only the County Court can establish a public road to be maintained by public funds."

First, it might be well to point out the definition of "county roads" as contained in Section 231.460, RSMo 1949:

"3. 'County roads' as used in sections 231.440 to 231.500 means all public roads located within any county, except roads or highways constructed or maintained as state roads or highways, and except roads, streets or highways in incorporated villages, towns or cities."

From that we come to the precise question which is whether the type of road outlined in your opinion request is a "public road" which may be improved, constructed, etc., under the provisions of the so-called King Bill.

The existing confusion has apparently arisen from the following statement contained in Hayes v. Kansas City, 294 Mo. 655, 242 S.W. 411, 414:

"(3) 3. In view of the above, it is not necessary to discuss the questions raised in the briefs of the parties with respect to the rights of Jackson county in such street. However, we may say that at the date of this attempted dedication, the county courts

Honorable Frank D. Connett, Jr.

possessed the exclusive power to establish new county roads, and they could only acquire jurisdiction to do so upon the petition of a specific number of householders. It was shown that the county court had never acted with respect to the street in controversy, and no individual citizen has the right, acting alone, to establish a public highway. Foster v. Dunklin, 44 Mo. 216; Snoddy v. Pettis County, 45 Mo. 361; Zeibold v. Foster, 118 Mo. 349, loc. cit. 354, 24 S. W. 155, State ex rel. Mermod v. Heege, 39 Mo. App. 49."

That statement was obviously dictum, therefore, it is not necessary to determine whether, considering the facts of the case, it is a correct statement of the law or not. If the court had contented itself with holding, as it properly did, that there had never been any acceptance of the offer of dedication by Jackson County, or that there was not even any offer to Jackson County by virtue of the dedication which could be accepted by it, this confusion would not have arisen.

We shall not take the space necessary to point out what the holdings of the court were in the cases cited above in support of the above quoted statement, but let it suffice to show by other and later cases that "public roads," may be established by means other than petition and order of the county court.

As contrary to the statement in the Hayes case, we direct your attention to that part of Garbee v. St. Louis-San Francisco Ry. Co., 220 Mo. App. 1245, 290 S.W. 655, 658, where the court said:

"* * * A road may be given the status of a public road without having been so established by petition and court order.* * *"

In Cochran v. Wilson, 287 Mo. 210, 227, 219 S.W. 1050, the court said:

"It is elementary that land may become a public highway by either dedication, condemnation, or prescription."

Honorable Frank D. Connett, Jr.

In *Gilleland v. Rutt*, Mo. App., 63 S. W. 2d 199, 201, there is the following statement:

"It has long been settled law in Missouri that the public may acquire the right to the use of a road or easement over the land of another, when such road has been established by condemnation, by dedication to public use by some unequivocal act, or from long use of the road as such by the public acquiesced in by the owner, and by adverse occupancy and use of the same by the public for a period of time equal to that prescribed by the statute of limitations (Mo. St. Ann. Sec. 850) for the purpose of bringing an action of ejectment. *State v. Walters*, 69 Mo. 463, loc. cit. 465; *State v. Wells*, 70 Mo. 635, *Longworth v. Sedevic*, 165 Mo. 230, 65 S.W. 260.

"In *Borchers v. Brewer*, 271 Mo. loc. cit. 143, 196 S. W. 10, 12, the Supreme Court said: 'If the donor's acts are such as indicate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete.' It has been held in numerous cases that the intent to dedicate may be implied from the circumstances (*Johnson et al. v. Ferguson et al.*, 329 Mo. 363, 44 S.W. (2d) 650, 653; *City of Hardin v. Ferguson*, 271 Mo. loc. cit. 414, 196 S.W. 746) and, in others, that acceptance by the public may be implied from long and continued use by the public. *City of Hardin v. Ferguson*, 271 Mo. loc. cit. 414, 196 S.W. 746; *Heitz v. City of St. Louis*, 110 Mo. 618, 19 S. W. 735; *McGrath v. Nevada*, 188 Mo. loc. cit. 107, 86 S. W. 236; *Curran v. City of St. Joseph*, 264 Mo. loc. cit. 659, 175 S.W. 584; *Benton v. City of St. Louis*, 217 Mo. loc. cit. 705, 118 S. W. 418, 129 Am. St. Rep. 561."

Duenke v. St. Louis County, 358 Mo. 91, 213 S.W. 2d 492, was a case which involved roads platted in an unincorporated area. The court said at S.W., l.c. 495:

Honorable Frank D. Connett, Jr.

"* * By virtue of the recorded plat the county would acquire title to land within the designated boundaries of a public road for use as such.* * *"

It was further held that such a road is a "public road" within the meaning of the section authorizing an appeal from a judgment of a county court vacating "any public road."

The case most nearly comparable to this one is Evans v. Andres, 226 Mo. App. 63, 42 S.W. 2d 32, 35, where it was held:

"* * *The streets in platted towns become public highways by dedication with the recording of the plat. No order of the county court accepting such dedication is required."

However, in Johnson v. Ferguson, 329 Mo. 363, 44 S.W. 2d 650, 653, the court said:

"While an acceptance is essential to a complete and irrevocable common-law dedication, 8 R.C.L. 898, Sec. 22; 18 C.J. 22, Sec. 67; Landis v. Hamilton, 77 Mo. 554; Kemper v. Collins, 97 Mo. 644, 11 S.W. 245; Baker v. Vanderburg, 99 Mo. 378, 12 S.W. 462; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734, under the authorities the acceptance may be by formal action, by public work thereon, by use by the public, or by building upon or otherwise improving abutting property in reliance thereon.* * *"

We believe it clear, therefore, that a "public road" within the meaning of Section 231.460, RSMo 1949, may be created by dedication and acceptance, and it is not required that such roads be established by the method provided in Section 228.020, RSMo 1949, in order to be qualified under the King Bill.

Having thus answered your first question it is unnecessary to answer the remaining questions submitted.

CONCLUSION

It is the opinion of this office that a public road may be established by dedication and acceptance so as to qualify

Honorable Frank D. Connett, Jr.

for improvement, construction, etc., under Section 231.460, RSMo 1949, and it is not necessary that such roads be established by petition and order of the county court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John W. English.

Yours very truly,

John M. Dalton
Attorney General

JWI:vlw,hw

FILED
119

COUNTY COURT: 1. County court of a second class county is
ACCOUNTING OFFICER: not obligated to pay for any supplies or per-
COUNTY SUPPLIES: sonal services acquired by contract or by order
COUNTY BUDGETS: unless such contract or order bears the proper
certification of the accounting officer. 2. A
county court of a second class county is not obligated to pay for
supplies acquired by contract or by order when the price or the
bill for such supplies so acquired exceeds the encumbrance stated
in the certification of the accounting officer for the contract or
order. 3. The county court cannot voluntarily pay for such per-
sonal services or supplies for which it is not legally obligated
to pay even if there is a balance otherwise unencumbered to the
credit of the appropriation to which it is to be charged, and a
cash balance otherwise unencumbered in the treasury to the credit
of the fund from which payment is to be made. 4. County officers,
who acquire supplies or personal services under the circumstances
set out in 1 and 2 above, are liable personally and on their bond
for such obligations under Section 50.650 RSMo 1949.

December 7, 1955

Honorable Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"I would like to have an opinion from your
office on the following question:

"Would it be unlawful for the Buchanan County
Court (a second-class county) to pay for sup-
plies which had been delivered and lawfully
contracted for except for the fact that the
contract or order, as the case might be, did
not bear the certification of the Accounting
Officer that there was a balance to the
credit of the appropriation to which it was
to be charged and that there was a cash
balance otherwise unencumbered in the treas-
ury to the credit of the fund from which
payment was to be made as required by Sec-
tion 50.660 RSMo.1949?

"However, there actually was such a balance
otherwise unencumbered to the credit of the
appropriation to which it would be charged
and also an unencumbered cash balance in
the treasury to the credit of the fund from
which payment could be made. You can assume
that Sections 50.760 to 50.790 inclusive,

Honorable Frank D. Connett, Jr.

RSMo.1949 have been complied with where applicable.

"This problem arises under two instances.

1. When it is necessary to incur obligations over the weekend and emergencies for personal services. 2. When an encumbrance is set up by the auditor before the contract or order is made but it turns out that the bill is bigger than the encumbrance. This sometimes happens on the repair of machinery where by your opinion to me dated January 27, 1955, by Robert R. Welborn, it is not necessary to take bids.

"It would seem to me that in these instances the county might not be compelled to pay but could do so if they so desired.

"If they did not, then the person contracting could recover their money under Section 50.650 RSMo.1949."

All contracts or orders referred to herein are to be assumed to be made pursuant to and in accordance with Sections 50.760 to 50.790 RSMo 1949.

Your first question would seem to be whether the county court of Buchanan County is obligated to pay for supplies which had been ordered by contract or order by the county court or by a county officer authorized under Sections 50.760 to 50.790 RSMo 1949, which contract or order does not bear the certification of the accounting officer that there was a balance to the credit of the appropriation to which it was to be charged and that there was a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment was to be made. That part of Section 50.660 pertinent hereto, reads as follows:

"* * * No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be

Honorable Frank D. Connett, Jr.

charged and a cash balance otherwise un-
encumbered in the treasury to the credit
of the fund from which payment is to be
made, each sufficient to meet the obli-
gation thereby incurred and unless such
contract or order bear the certification
of the accounting officer so stating;
* * * (Emphasis supplied.)

Thus, this section means that no contract or order whenever made or for whatever made, that is, on a weekend or for emergency personal service, is to be binding on the county court unless the order or contract carries with it the certification of the accounting officer as provided in that section. In Traub v. Buchanan County, Mo. Sup., 108 SW2d 340, the Missouri Supreme Court stated at page 343:

"The situation is that section 19 of the Budget Act (Mo. St. Ann. Sec. 12126s, p. 6434) expressly states that "no contract or order imposing any financial obligation on the county shall be binding on the county unless * * * there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligations thereby incurred and unless such contract or order bear the certification of the accounting officer so stating." (Italics added.) Concededly, none of these quoted requirements was here present.

"The Missouri rule is that, where a statute expressly states that, unless certain things are done, a contract by a political subdivision or a municipal corporation shall be invalid, there can be no estoppel urged to support the contract. Mullins v. Kansas City, 268 Mo. 444, 459, 188 S.W. 193, Seaman v. Levee District, 219 Mo. 1, 26, 117 S.W. 1084; Edwards v. Kirkwood, 147 Mo. App. 599,

Honorable Frank D. Connett, Jr.

614, 127 S.W. 378; W. W. Cook & Son v. City of Cameron, 144 Mo. App. 137, 142, 128 S.W. 269, 270; also, see, Phillips v. Butler County, 187 Mo. 698, 86 S.W. 231."

Also, in Missouri-Kansas Chemical Co. v. Christian County, 180 S.W.2d 735, the Missouri Supreme Court stated at page 736:

"(1) The chemical company contends it is entitled to judgment for the full amount because the county budget law does not affect its transactions with Christian County. That county is one of less than 50,000 inhabitants. Only Sections 10910 to 10917, inclusive, R.S. 1939, Mo. R.S.A., of the budget law apply to such counties. It claims that Section 10932 which invalidates contracts made in violation of the county budget law does not apply to counties of this class." (Emphasis supplied.)

Section 10932 RSMo 1939, is now Section 50.660 RSMo 1949.

Thus, the Missouri Supreme Court has inferred by the last two cited cases that unless the things be done as set out in Section 50.660 RSMo 1949, the contract or order is invalid. Being invalid the county court would not be obligated to pay for such supplies or personal services.

Your second question is whether the county court is obligated to pay for supplies ordered by contract or by order when the amount contained in the certification of the accounting officer is not sufficient to cover the bill for the supplies ordered by contract or by order. Reading that part of Section 50.660 that is quoted supra, we come upon these words: "unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred * * *".

Thus, according to these words as used in that section the contract or order is not binding upon the county if the amount or the encumbrance certified by the accounting officer is not sufficient to cover the price or the bill for the supplies, or in other words, if the contract or order is for a greater sum than that set aside as

Honorable Frank D. Connett, Jr.

certified by the accounting officer, then the contract or order is not binding upon the county court and the county court would not be obligated to pay the same.

Your third question is whether or not the county can voluntarily pay for such goods or services if it does, in fact, have a sufficient balance otherwise unencumbered to the credit of the appropriation to which it is to be charged, and there is a cash balance otherwise unencumbered in the treasury to the credit of the fund from which it is to be paid.

If we were dealing with private persons, it would, of course, be permissible to pay for such goods or services actually received. However, in this case, we are dealing with public officials handling and disbursing public funds. Such public funds, it has been held by the courts of Missouri, are trust funds and those who have the custody of such funds are absolutely liable for the safekeeping and proper disbursement thereof, and such liability attaches even in the case of loss without fault or negligence on the part of the custodian. See *City of Fayette v. Silvey*, 290 SW 1019. A study of the Missouri cases reveals that public officials are authorized to disburse such public funds only when and in the manner specifically authorized by statute. See *Kansas City v. Halvorson*, 352 Mo. 280, 177 SW2d 495; *Elkins-Swyers Office Equipment Co. v. Moniteau County*, 357 Mo. 448, 209 SW2d 127; and *State v. Weatherby*, 344 Mo. 848, 129 SW2d 847.

Thus, since the statutes do not specifically authorize the county to pay for the goods and services here in question, and since the statutes do specifically provide that there is no legally enforceable obligation upon the county to pay for such goods or services, it is the conclusion of this office that the county may not voluntarily expend public funds for such purposes. To allow a county to make such voluntary payments would open the door to all manner of favoritism and abuse, and when the statutes provide that the county is not obligated to pay, it follows that they may not voluntarily pay.

Your fourth and last question is if the county court is not obligated to pay for such supplies or services as set out in questions one and two, then would the person contracting or ordering the supplies and services be obligated personally or on their bond to pay for such under Section 50.650 RSMo 1949. That part of Section 50.650 pertinent hereto reads:

"* * * Any officer purchasing any supplies, materials or equipment shall be liable per-

Honorable Frank D. Connett, Jr.

sonally and on his bond for the amount of any obligation he may incur against the county without first securing the proper certificate from the accounting officer. * * *

In Missouri-Kansas Chemical Co. v. New Madrid County, 139 SW2d 457, the Missouri Supreme Court said at page 458:

"(3) Section 20 of the county budget law provides, in part, that 'any officer purchasing any supplies * * * shall be liable personally * * * for the amount of any obligation he may incur against the county without first securing the proper certificates from the accounting officer.' Plaintiff says this section renders defendant Harris liable. As stated, New Madrid is a county of less than 50,000 inhabitants. Section 20 applies to counties of more than 50,000 inhabitants. See Sec. 9, mentioned supra. * * *" (Emphasis supplied.)

Thus, under that part of Section 50.650 cited above, and under the quoted part of the case cited above it seems that where a county officer of a second class county orders supplies by contract or order without first securing a proper certificate from the accounting officer such county officer is liable personally and on his bond for the amount of such obligation, and also when a county officer purchases supplies in excess of the sum contained in the certificate of the accounting officer, he would be liable for the full obligation incurred against the county.

Conclusion.

It is the opinion of this office that:

1. A county court of a second class county is not obligated to pay for any supplies or personal services acquired by contract or by order by a county officer unless such contract or order bears the proper certification of the accounting officer.

2. A county court of a second class county is not obligated to pay for supplies acquired by contract or by order when the price or the bill for such supplies so acquired exceeds the encumbrance stated in the certification of the accounting officer for the contract or order.

Honorable Frank D. Connett, Jr.

3. The county cannot voluntarily pay for such supplies or services for which it is not legally obligated to pay.

4. County officers who acquire supplies or personal services under the circumstances set out in 1 and 2 above, are liable personally and on their bond for such obligations under Section 50.650 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

HLV;FLH:sm

WITNESSES:
RIGHT OF CONFRONTATION:
RIGHT OF CROSS-EXAMINATION:
EVIDENCE:

House Bill No. 219 of the 68th
General Assembly, proposing to
amend Sections 561.450 and 561.460,
RSMo 1949, is unconstitutional.



April 21, 1955

Honorable Daniel Curran
House of Representatives
Room 408, Capitol Building
Jefferson City, Missouri

Dear Sir:

You recently requested an opinion of this office as to the constitutionality of the provisions of House Bill No. 219, wherein it is proposed to amend Sections 561.450 and 561.460, RSMo 1949, by adding to each section the provision:

"Where the check has been protested, the notice of protest thereof is admissible as proof of presentation, nonpayment and protest, and is presumptive evidence that there was a lack of funds in or with the bank or other depository, or where the check has not been protested, a certificate under oath of any officer of the bank or other depository that there was a lack of funds in or with the bank or other depository is admissible as proof and is presumptive evidence of the lack of funds."

The questionable part of this provision is that which provides for the admission in evidence of the notice of protest as proof of presentation, nonpayment and protest, and for admission into evidence of a certificate under oath of any officer of the bank upon which the check is drawn. Your specific question was whether or not these provisions would violate the right of the defendant to meet the witnesses against him face to face.

This right is granted by Section 18(a), Article I, Constitution of Missouri, 1945, wherein it is provided: "That in criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . ." This provision of the Constitution has been considered by the Supreme

Honorable Daniel Curran

Court of Missouri on various occasions, but in none of these cases was the exact question which you ask considered by the court. The court has held that where a witness testified at one trial of the defendant and where eventually a second trial of the same case was necessary and the witness was unavailable, the state could use the transcript of the testimony of the witness at the first trial. It was held that this did not violate the constitutional rights of the defendant especially since, as a matter of fact, he had met the witness face to face at the first trial and had enjoyed the right of cross-examination. State v. Brown, 331 Mo. 556, 56 S.W. (2d) 405. This is true even though the defendant did not avail himself of his right to cross-examine at the first trial. State v. Logan, 344 Mo. 351, 126 S.W. (2d) 256. See also State v. Harp (En Banc), 320 Mo. 1, 6 S.W. (2d) 562, and State v. Lloyd, 337 Mo. 990, 87 S.W. (2d) 418, where it was held that testimony given in the presence of the defendant at his preliminary hearing was admissible at the trial where the witness was unavailable and that the defendant's constitutional right of confrontation was not violated thereby. The court has likewise held that the use of dying declarations was admissible and that the use of such declarations did not violate the defendant's constitutional right of confrontation where the declarations of one whom the defendant had killed were admitted into evidence against the defendant on trial for such homicide. See State v. Logan, 344 Mo. 351, 126 S.W. (2d) 256. This admissibility of dying declarations was well established in the common law and was part of the law concerning the right of the defendant to meet the witnesses against him face to face at the time such constitutional provisions were enacted in Missouri.

The Supreme Court of Missouri has likewise held in the case of State v. Pendergraft, 332 Mo. 301, 58 S.W. (2d) 290, that the use of official records was permissible to prove a charge of being an habitual criminal even though the defendant was thereby denied the privilege of confronting the witnesses against him and could not cross-examine them.

It should be noted that this case concerning official records is the only one in Missouri where the court has allowed the use of evidence when the defendant did not have at that time or had not had in the past (at a former trial or preliminary hearing) the right to confront and cross-examine the witness.

The proposed provisions of House Bill No. 219 would allow the admission in evidence against the defendant of an extrajudicial statement of some official of the bank upon which a

Honorable Daniel Curran

fraudulent check was drawn. The defendant would not have the right to meet such witness or witnesses face to face and would not have the privilege of cross-examining them. The only case in Missouri considering the admission of such extrajudicial statements is that of State v. Gorden, 356 Mo. 1010, 204 S.W. (2d) 713. That case was a trial for the crime of incest, and when the victim was placed upon the witness stand she refused to testify as to the acts constituting the offense on the grounds that such testimony might tend to incriminate her. When faced with this situation the state introduced an unsworn statement previously made by the victim to the chief of police. This statement was accepted as evidence of the facts contained therein, and the Supreme Court reversed the conviction obtained thereby, stating emphatically that the use of such extrajudicial statements as proof of the truth of the facts contained therein was a flagrant violation of the right of the defendant to meet the witnesses against him face to face as granted by Section 18, Article I, Constitution of Missouri, 1945. The court said, 204 S.W. (2d) 1. c. 715:

"* * * This provision assures to one accused of crime the rights of confrontation and of cross-examination under oath and excludes extrajudicial statement of witnesses as probative evidence of a defendant's guilt in the circumstances of the instant case. * * "

On this basis it would seem that the provisions proposed to be enacted by House Bill No. 219 would be unconstitutional as violative of the rights of the defendant to meet the witnesses against him face to face.

The writer is informed that the provisions proposed to be enacted by House Bill No. 219 have been taken from Section 1292-a of the New York Penal Code. An examination has been made of McKinneys's Consolidated Laws of New York, Annotated, Volume 39, Part 2, wherein this section is contained, and it appears from such annotations that this New York statute has never been attacked on the grounds of its constitutionality.

It should be noted that until January 1, 1939, the right to confrontation was purely a statutory right in New York, the constitutional provision to that effect going into force on said date. However, it would appear from the case of People v. Nisonoff, decided by the Court of Appeals in New York in 1944, 293 N.Y. 597, 59 N.E. (2d) 420, that the Court of Appeals in New York would not sustain the provisions here in question if they were attacked on

Honorable Daniel Curran

constitutional grounds. In the Nisonoff case the defendant was charged with committing manslaughter as a result of the death of a young lady upon whom he had performed an abortion. An autopsy on the victim had been performed by an assistant medical examiner who, pursuant to provisions of law, dictated his findings while making the autopsy examination. At the time of trial the assistant medical examiner was dead and such findings were offered in evidence. The New York Court of Appeals carefully considered the question and pointed out that the constitutional provision effective January 1, 1939, guaranteeing to the defendant the right to be confronted by the witnesses against him, must be considered in the light of the law as it existed at the time when such provision was enacted. The court also pointed out that the use of official records was well recognized in New York and elsewhere and stood upon a plane comparable to that of dying declarations and that, therefore, official records were admissible against the defendant even though he was thereby denied his right of confrontation, as a well-established exception to such right.

It would appear that the reasoning of the New York Court is in accord with that of the Supreme Court of Missouri, since both recognize the admissibility of dying declarations and official records as being long-established exceptions to the defendant's right of confrontation. However, neither extends such exceptions to extrajudicial statements of witnesses which are not embodied in official records.

A search of the cases has revealed no decisions exactly in point. However, the Illinois case of *People v. Vammer*, 320 Ill. 287, 150 N.E. 628, considered a similar situation. This was a prosecution for forgery and the state introduced in evidence the check alleged to have been forged. This check showed on its face the notation that it was returned because of forgery. The Supreme Court of Illinois pointed out that, since the person who made such notation was not present to confront and be cross-examined by the defendant, the constitutional provision that the defendant had a right to meet the witness face to face was violated.

A similar conclusion was reached by the Supreme Court of West Virginia in the case of *State v. Fugate*, 103 W. Va. 653, 138 S.E. 318. This again was a case of forgery and the notice of protest introduced in evidence stated that the payment on the check was refused because of forgery. The court pointed out that the forgery was an issue in the case and that the admission of such documentary evidence violated the defendant's constitutional

Honorable Daniel Curran

rights. The court said, 138 S.E. 1. c. 320:

"In support of the first assignment, it is urged that the evidence complained of violated section 14 of our Bill of Rights (Const W. Va. art. 3), providing that the defendant in criminal prosecutions be confronted with the witnesses against him. This right is fundamental in our jurisprudence. 8 R.C.L. 89. The question here was whether or not the note was forged. The defendant did not admit the forgery; hence it was an issue to be proved by competent evidence beyond a reasonable doubt. The written statement that the signature was 'forged' was permitted to go to the jury, with all the consequent prejudicial effect flowing therefrom."

In the Arkansas case of Smith v. State, 200 Ark. 1152, 143 S.W. (2d) 190, the defendant was charged with assault with intent to kill. His defense was a plea of insanity and the state introduced hospital records tending to show that the defendant was sane, without producing as a witness the doctor or doctors who made such finding. The Supreme Court of Arkansas held that the admission of such evidence was reversible error because it denied defendant the constitutional right of confrontation. At 143 S.W. (2d) 192 the court said:

"It is a fundamental rule of the English common law, embodied in both the State and Federal Constitutions as a part of the Declaration of Rights, that in all criminal prosecutions the accused shall have and enjoy the right to be confronted by the witnesses against him. To be confronted by the witnesses against him does not mean merely that they are to be made visible to the accused, so that he shall have the opportunity to see and to hear them, but it imports the constitutional privilege to cross-examine them. The right of cross-examination is a substantive right, and a most valuable and important one. By it the accused can test the interest, prejudice, motive, knowledge, and truthfulness of the witness, and nothing can be substituted for this right of cross-examination."

Honorable Daniel Curran

The Supreme Court of Michigan reached a similar result in the case of *People v. Mayrand*, 300 Mich. 225, 1 N.W. (2d) 519, and so did the Supreme Court of South Carolina in the case of *State v. Hester*, 137 S.C. 145, 134 S.E. 885.

In California the right of confrontation appears to be statutory rather than constitutional, and hence the California cases indicating that such statutory right may be abridged by another statute are not in point. Further, it is felt that the decision of such courts as those in Louisiana and Washington, wherein it is held that a document is not a "witness" and therefore does not come within the purview of the constitutional right, is not persuasive.

The provisions proposed to be enacted by House Bill No. 219 would allow the introduction in evidence of either a notice of protest or a certificate of the drawee bank. Such would constitute extrajudicial writings not constituting official records and not coming within any other well-recognized exception to the defendant's constitutional right of confrontation, and therefore would be violative of the defendant's constitutional rights.

CONCLUSION

It is therefore the conclusion of this office that the provisions proposed to be enacted by House Bill No. 219, set out hereinabove, would be violative of the right of confrontation granted to defendant by Section 18(a), Article I, Constitution of Missouri, 1945.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Fred L. Howard.

Yours very truly,

JOHN M. DALTON
Attorney General

FLH;ml:da

SHERIFF:
DEPUTY SHERIFFS:
SALARY OF DEPUTY SHERIFFS:
FEES OF SHERIFFS:
SHERIFF'S FEES:

Deputy sheriff of Class 3 county cannot be paid fee of \$3.00 per day for attendance upon court in addition to his regular salary.

May 18, 1955

Mr. Robert E. Crist
Prosecuting Attorney
Shelby County
Shelbina, Missouri



Dear Mr. Crist:

You recently asked for an official opinion of this office wherein the question was:

"Section 57.250 R.S. 1949 provides for compensation for a deputy sheriff. Section 57.280 R.S. 1949 provides for fee of sheriffs. The sheriff may have three deputies attending court and be allowed \$3.00 per day for each deputy, and this fee is paid to the sheriff and not the deputies.

"Question: May a circuit judge fix the compensation of deputy sheriffs at a regular salary and in addition allow for attending court?

"The proposed order of the circuit judge is as follows: Now on this ____ day of ____, 1955, it is hereby ordered that in addition to the regular salary the deputy sheriff of Shelby County, Missouri, shall be allowed and paid to John Doe the same allowance for attendance upon the court, while same is in session, as allowed to the sheriff of Shelby County, Missouri, the sum of \$3.00 per day. It is further ordered that his regular salary be increased from \$____ per month to \$____ per month."

By the provisions of Section 57.250, RSMo. 1949, the circuit court may make an order authorizing the sheriff to appoint a given number of deputies and assistants and specify their compensation... This is the only section of the statutes applying to your county which provides for the setting of the pay of deputy

Mr. Robert E. Crist

sheriffs and it is not believed that this authorizes compensation on a fee basis. The proposed order provides that the deputy shall receive the same fee as the sheriff for attending court, i.e., \$3.00 per day, in addition to his regular salary.

Section 57.280 provides for the fees of sheriffs and, among other things, that the sheriff shall be allowed "for attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day - - - \$3.00." This section refers only to sheriffs and only the person holding the office of sheriff is entitled to recompense thereunder. Further, this statute does not authorize the payment of fees to deputy sheriffs and it does not authorize the payment of such fees twice, once to the sheriff, and once to the deputy.

Where the Legislature has decided that fees listed in a fee schedule comparable to that contained in Section 57.280, should be paid to a deputy the Legislature has specifically so provided as was done, for instance, in paragraph 2 of Section 57.290, RSMo. 1953 Cum. Supp.

It would, therefore, appear that the proposed order providing for a salary plus a fee to the deputy is not within the intention of the Legislature and exceeds the power granted by Section 57.250 wherein the judge is authorized to fix the compensation of the deputy. It is a general principle in the law of Missouri that public officials shall receive compensation for the service rendered only when such compensation is expressly authorized by statute. In this case the statute expressly authorizes the circuit court to fix the compensation for deputies (Section 57.250) but has not authorized fees to be paid to deputies for attending court in addition to their regular compensation, which, in this case, is a salary.

Likewise, the statute specifically authorizes the fee for attending court to be paid to the sheriff (Section 57.280) but has not authorized this fee to also be paid to the deputy. Therefore, it would appear as was held by the Supreme Court in the case of *Maxwell v. Andrew County*, 146 S.W.2d. 621, 1.c. 625:

"The statutes regulating the compensation of sheriffs expressly provide for the payment of mileage in certain cases. For example, such provision is made when the officer is serving subpoenas or writs or transporting a prisoner to the penitentiary. The specification

Mr. Robert E. Crist

in the statute of instances when mileage
is to be paid and money lawfully be received
by the sheriff constitutes an implied pro-
hibition upon its collection in other instances.
* * * *

CONCLUSION

It is, therefore, the conclusion of this office that since the statute does not specifically authorize payment of a \$3.00 per day fee to deputies for attending court in addition to their salary that such may not be done. The deputy may be compensated only by his regular salary and the \$3.00 per day fee for attending court authorized by Section 57.280, RSMo. 1949, is payable to the sheriff not to the deputy.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:mw

ASSESSORS:
MERCHANT'S TAX:

Under the provisions of Section 150.055, the county assessor is required annually, prior to the first Monday in May, to visit and inspect each place of business, warehouse, store or other establishment owned and operated by any merchant within the county for the purpose of acquiring information to be used as a basis for comparison with the statement returned by a merchant. Such information is to be returned by the assessor on forms prescribed by the county court to the county board of equalization.



August 10, 1955

Mr. Robert E. Crist
Prosecuting Attorney
Shelbina, Missouri

Dear Mr. Crist:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"Please advise as to what inspection and visit and report, if any, is required of the County Assessor by Section 150.055, M.R.S., 1949, as enacted in 1952.

"If an inspection and visit and report are required, what are the penalties in the event the county assessor refuses to make such inspection, visit and report."

Section 150.055, RSMo. Cum. Supp. 1953, provides as follows:

"The county assessor at least once each year prior to the first Monday in May shall visit and inspect each place of business, warehouse, store or other establishment owned and operated by any merchant within his county, for the purpose of obtaining such information as may be desirable or necessary to provide an accurate basis for comparison with the statement made by such merchant under section 150.050. A report of the information so obtained with respect to each merchant, in such form as may be prescribed by the county court, shall be made by the assessor to the county board of equalization."

Mr. Robert E. Crist

The terms of this section are clear and unequivocal. The assessor is required annually, prior to the first Monday in May, to visit and inspect each place of business, warehouse, store or other establishment owned and operated by any merchant within the county. The purpose of such visit and inspection is to acquire information to be used as a basis for comparison with the statement made by the merchant. Such information is to be returned on forms prescribed by the county court to the county board of equalization.

You further inquire what penalties may be imposed in the event that the assessor refuses to make such inspection, visit and report. In answer to this question I am enclosing a copy of an opinion to Clarence Evans, Chairman, Missouri State Tax Commission, under date of February 7, 1949, holding that if a county assessor fails to perform the duties enjoined upon him by law he may be removed from office by the county court or he may be sued upon his official bond by the presiding judge of the county court, by the prosecuting attorney, or by any individual acting in his private capacity or quo warranto proceedings may be brought against such negligent assessor to remove him from office.

Section 7, page 1784, Laws Mo. 1949, referred to in the enclosed opinion, is now found in substantially the same form in Section 53.190 RSMo 1949. Section 11234, RSMo. 1939, referred to in the enclosed opinion is now found as Section 139.300, RSMo. 1949.

CONCLUSION

It is the opinion of this office that under the provisions of Section 150.055, the county assessor is required annually, prior to the first Monday in May, to visit and inspect each place of business, warehouse, store, or other establishment owned and operated by any merchant within the county for the purpose of acquiring information to be used as a basis for comparison with the statement returned by a merchant. Such information is to be returned by the assessor on forms prescribed by the county court to the county board of equalization.

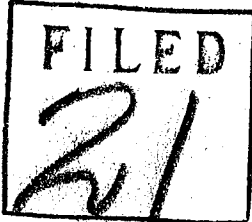
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

Enc.(1)
Hon. Clarence Evans
Chairman, State Tax Comm.
DDG:mw

MARRIAGE LICENSES: : A recorder of deeds is entitled to a fee
RECORDERS OF DEEDS: : of \$1.00 for the recordation of a marriage
FEES: : license and the return thereon; and is
SALARIES: : further entitled to a fee of 50¢ for each
: marriage certificate filed with him if
: the recorder makes the report required
: by Section 193.340, RSMo 1949.
.....



January 10, 1955

Honorable Bill Davenport
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Mr. Davenport:

Your letter of November 12, 1954, requesting an
official opinion, is as follows:

"The Circuit Clerk of this County has
requested that I obtain the opinion of
your office on the following question
of interpretation of Section 193.350
and Section 451.150, RS Mo. 1949.

"The precise question is whether the
fee mentioned in Section 193.350, supra
is included in the fee mentioned in
Section 451.150, supra, that is, whether
the total fee to be charged with respect
to the services of Recorders in handling
marriage licenses is \$1.00 or \$1.50."

All statutory citations herein are RSMo 1949, un-
less otherwise noted.

Section 451.080 authorizes recorders of deeds to
issue marriage licenses and requires persons solemniz-
ing marriages to make a return of the license to the
recorder. Said section reads, in part:

"1. The recorders of the several counties
of this state, and the recorder of the city
of St. Louis, shall, when applied to by any
person legally entitled to a marriage license,
issue the same * * *:

* * * * *

Honorable Bill Davenport:

"3. On which said license the person solemnizing the marriage shall, within ninety days after the issuing thereof, make as near as may be the following return, and return such license to the officer issuing the same:

"State of Missouri,)
County of _____,) ss.

"This is to certify that the undersigned _____ did at _____ in said county, on the _____ day of _____, A.D. 19____, unite in marriage the above-named persons."

Section 451.150 requires the recorder of deeds to place on record all marriage licenses issued and the return thereon, and authorizes a fee therefor. Said section reads:

"The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon, for which he shall receive a fee of one dollar, to be paid for by the person obtaining the same."

With the apparent purpose of assisting the Bureau of Vital Statistics in keeping its records, the Legislature enacted Section 193.340 in 1947, imposing upon officers issuing marriage licenses a new duty, viz., to make a monthly report to the State Registrar of marriage certificates filed with such issuing officer. That section reads:

"Every person who performs a marriage ceremony shall prepare and sign a certificate of marriage in duplicate one of which shall be given to the parties and the other filed by him within ten days after the ceremony with the officer who issued the marriage license."

Honorable Bill Davenport:

Every officer who issues a marriage license shall forward to the state registrar on or before the fifteenth day of each calendar month a list of the certificates of marriage which were filed with him during the preceding calendar month on forms to be furnished by the state registrar."

Such officers issuing marriage licenses are entitled by Section 193.350 to a fee for making a report of the marriage certificates filed with him. Section 193.350 reads:

"Every officer authorized to issue marriage licenses shall be paid a recording fee of fifty cents for each marriage certificate filed with him and reported by him to the state registrar. The recording fee shall be paid by the applicant for the license and be collected together with the fee for the license."

Section 59.310, RSMo Cum. Supp. 1953, authorizes the recorder of deeds to charge a fee for supplying a certified copy of a marriage certificate. That section reads, in part, as follows: "Recorders shall be allowed fees for their services as follows: * * * . For every certified copy of a marriage certificate \$1.00 * * *."

There is no conflict in the above provisions. Section 451.150 authorizes a fee of \$1.00 for the recording of the marriage license (with the return). Section 193.340 authorizes a fee of 50¢ per certificate for sending to the State Registrar, each month, a list of the marriage certificates returned to the recorder during the preceding month. Section 59.310 authorizes a fee for supplying (if requested) a certified copy of a marriage certificate. Since each statute sets out a specific duty, and authorizes a fee for the performance of each, we conclude that such fees are cumulative.

CONCLUSION

It is, therefore, the opinion of this office that a recorder of deeds is entitled to a fee of \$1.00 for the

Honorable Bill Davenport:

recordation of a marriage license and the return thereon; and is further entitled to a fee of 50¢ for each marriage certificate filed with him if the recorder makes the report required by Section 193.340 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

OFFICERS: Assignment of future unearned compensation by county officer is null and void. County court is legally unauthorized to advance unearned compensation to assessor and before settlement made with court.



April 7, 1955

Honorable George Q. Dawes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Mr. Dawes:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads in part as follows:

"The first question is: May a county officer who receives his compensation only once a year make a valid assignment of future or unearned compensation after he has embarked upon his duties? It is my understanding of the law that an assignment of future wages of a public officer is against public policy and void.

"The second question is: Does the county court have the authority to advance part of a county assessor's compensation before settlement?

"The county assessor has asked the court for an advance payment of \$200.00 to \$300.00 on his compensation which will not be due him until June. The assessor has performed some of his duties but not all. It has been the practice in the past to make such advances but I have advised against it pending your opinion."

As it will be seen from the first inquiry, the principle of law involved is in regard to whether or not future unearned compensation of a public officer can be validly assigned. The general rule is that one who does not have an existing contract of employment cannot assign future unearned profits or wages, and said rule has been given in Vol. 6, C.J.S. pp. 1067 and 1068, and reads as follows:

Honorable George Q. Dawes

"As a general rule an assignment of profits, earnings, or wages to be earned in the future is void if, at the time of the assignment, there is no existing contract or employment under which such profits, earnings, or wages are to accrue, except to the extent that such an assignment may be authorized by statute. Under the general rule, an assignment cannot be made of a book account which as yet has no potential existence.

"An assignment of wages or earnings not founded on an existing contract, is void as tending to subject wage-earners to harsh and unreasonable conditions of servitude, and as being against public policy; and on the ground that such future earnings or wages having no actual or potential existence at the time of the assignment constitute a mere possibility not coupled with an interest; and has also been held to be void on the ground that the assignment is too vague and uncertain to be sustained as a transfer of property."

The same general rule is also applicable and will prevent a public officer from assigning the unearned salary, wages, or fees of his office. This general rule has also been given in Vol. 6, C.J.S., pp. 1068, 1069, and reads as follows:

"Although there are some decisions to the contrary it is a well settled general rule that an assignment by a public officer of the unearned salary, wages, or fees of his office is void as against public policy, even though they are falsely represented to be earned; and a collection under such an assignment is ineffectual as to such officer, and leaves the salary or fees still due so far as he is concerned. The general rule is especially applicable where, as in some jurisdictions, the rule, with some qualifications, is embodied in statutes restricting and regulating the assignment of unearned wages and salaries, which statutes have been held valid as a proper exercise of the police power. The general rule is not changed by a statute making unearned salary or fees subject to garnishment. An assignment of both earned and unearned salary or fees is deemed severable, and is valid as to so much as has been earned at the time of the assignment."

Honorable George Q. Dawes

Section 432.030 RSMo 1949, permits the assignment of wages, salaries and earnings in the manner prescribed as to such compensation already earned, but declares that the assignment of wages, salaries, and earnings not earned at the time of making the assignment, shall be null and void. Such section reads as follows:

"All assignments of wages, salaries or earnings must be in writing with the correct date of the assignment and the amount assigned and the name or names of the party or parties owing the wages, salaries and earnings so assigned; and all assignments of wages, salaries and earnings, not earned at the time the assignment is made, shall be null and void."

While the last section does not specifically refer to the assignment of unearned compensation of public officers, it is believed that its provisions are broad enough to include such assignment, and does make the assignment of unearned compensation of public officers invalid. This section and particularly the last portion of same, which we have underscored, has been upon the statute books since 1911 (L.Mo. 1911, p. 143). This law has been attacked upon various grounds, upon numerous occasions, but its constitutionality has always been upheld. Illustrative of this fact is the case of Heller v. Lutz, 254 Mo. 704. From the facts involved in this case, it appears that both appellants and respondents were separately engaged in the mercantile business in the City of St. Louis, Missouri, and that one Patrick Hannigan was in the employ of respondents. He owed a prior debt to appellant, and upon August 16, 1911, he executed a written assignment of all wages due or to become due him from respondents within the next six months' period from the date of the assignment, although no wages were due him upon the date of said assignment. Appellants notified respondents of the assignment, which notice was returned with a statement to the effect that the notice would be ignored by them, as such assignment was in violation of the statute prohibiting assignment of unearned wages, and that Hannigan had been paid the wages due him. Appellants then sued respondents to recover the amount of Hannigan's debt to them. The case was tried upon an agreed statement of facts, substantially the same as that set forth above, and the court rendered judgment for the defendants from which plaintiffs appealed.

Some interesting questions were raised in the motion for new trial, and which were properly preserved for review

Honorable George Q. Dawes

of the Supreme Court, and finally passed upon by that court, among which are: Notice of assignment; is the assignment a property right? does the assignment create a chose in action? constitutionality of the statute.

The first three questions were decided in the negative, while the last one was decided in the affirmative.

Insofar as our present discussion is concerned, we believe it unnecessary to give the legal reasons the court had for deciding each question, except the fourth which is believed to be pertinent to our present discussion. Therefore, excerpts from the court's opinion regarding said question will be given. At l. c. 713, 714 and 718, the court said:

"IV. Constitutionality of Statute. The part of the statute contended by the appellants to be invalid, is as follows: 'All assignments of wages, salaries and earnings not earned at the time the assignment is made, shall be null and void.'

"The presumptions are always in favor of the constitutionality of a statute; and it will not be declared invalid unless its contravention of the Constitution is so manifest as to leave no room for reasonable doubt.

"* * * * *

"The exercise of the police power as evidenced by various phases of legislation affecting individual liberty or personal rights, has met with judicial approval in many cases, the rule to be deduced therefrom being that in civilized society there is no such thing as an unrestrained power on the part of the individual to contract, this right being subject to wise and beneficial police regulations; and when an act which may prove detrimental to the public welfare is prohibited by a general statute, it will be upheld unless it is clearly in violation of some provisions of the organic law. (Grimes v. Eddy, 126 Mo. 168, 26 L.E.A. 638; State ex inf. Firemen's Fund Ins. Co., 152 Mo. 1, 45 L.E.A. 363; Karnes v. A.M.F. Ins. Co., 144 Mo. 413; Morrison v. Morey, 146 Mo. 543.)"

"* * * * *

Honorable George Q. Dawes

"In view of these facts, even if it be conceded that an assignment of unearned wages is a property right, to our mind a palpable absurdity, or that it is a chose in action, although it has no potential existence, the validity of the statute should be upheld on the ground that its enactment is a wholesome exercise of the police power."

Again, in the case of *The State v. Williamson*, 118 Mo. 146, it was held that the contract by a public officer, for the sale and collection of his unearned salary, is against public policy and void. This was a criminal case in which the defendant was tried and convicted of embezzling \$107.00. He was a mail carrier in the Kansas City post office and received a salary of \$107.00 per month. He executed a written assignment on November 30, 1892, of the salary of \$100.00 he would receive for the month of December that year, to Mullholland, and also appointed Mullholland his agent and gave him an order to the postmaster for that sum. He also sold his salary to other parties, but when it became due collected it from the government and refused to pay it over to Mullholland. After conviction, the defendant timely appealed to the Supreme Court, and the Court, in discussing the facts and legal principles involved, said at l.c. 150, 151 and 152:

"The vital question in this case and the one upon which this prosecution and conviction must stand or fall is as to the validity of the contract between the defendants and Mullholland. If the contract was void because against public policy, then the defendant must be discharged, not being guilty of any criminal offense under the statute.

" * * * * *

"The reason of the rule is that the public service may not be so good and efficient when the unearned salary has been assigned as when it has not been, and 'that the public service is protected by protecting those engaged in the performance of public duties,' and this, not upon the ground of their private and individual interest, but that of the necessity of securing the efficiency of the public service by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work at such periods as the law has appointed for their payment. *Bliss v. Lawrence*, supra.

Honorable George Q. Dawes

"If an officer can assign this unearned salary for a month, he can, of course, assign it for a year, or longer, and it will hardly be contended in such case that he would be as efficient and diligent as if he were to receive his salary in person or for his own benefit as it became due. For these reasons we think the contract for the sale and collection of the unearned salary of defendant void and of no effect, being against public policy."

In view of the foregoing, and in answer to the first inquiry of the opinion request, it is our thought that any assignment by a county officer of his future unearned compensation is null and void. This is true, regardless of whether the compensation is paid in the form of a salary or fees at the end of each year, or any other fixed period of time.

The second question is whether or not the county court has authority to advance part of a county assessor's compensation before settlement. The general rule is that a public officer is not entitled to any compensation until he has performed the services, which, we believe, applies in the present instance, and that such rule should be considered along with the applicable statutes in ascertaining the correct answer to this inquiry. Said general rule is stated in Vol. 67, C.J.S., pp. 319, 320, and reads as follows:

"As respects compensation, an office is taken cum onere, and public officers have no claim for official services rendered except where, and to the extent that compensation is provided by law. The duties of a public officer may be exacted without specific compensation, and, when no compensation is provided, the rendition of services is deemed to be gratuitous. A public officer has no rights of any sort to compensation for his services before he has earned it, even if prevented from performing such services by legislative action."

In view of the fact that the second inquiry refers to an "advance" of part of the assessor's compensation "before settlement," we assume that the question was intended to refer only to the fees provided by Section 53.140 MoRS Cum. Supp. 1953, since the correct amount of fees due under provisions of this section could not be determined and paid until after settlement with the county court of a fourth class county.

Therefore, our discussion and answer to the second inquiry will be strictly limited to the payment of the assessor's fees provided by said Section 53.140.

Honorable George Q. Dawes

Your county of Iron is one of class four, consequently the compensation of the assessor will be paid in accordance with the provisions of Section 53.140, MoRS Cum.Supp. 1953, reading as follows:

"The compensation of the county assessor in counties of the fourth class shall be sixty cents per list, and each county assessor shall be allowed a fee of six cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person to be counted as one name, one half of which shall be paid out of the county treasury and the other one half out of the state treasury. The assessor in counties of the fourth class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book; provided, that nothing contained in this section shall be so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list."

The assessor's claim for one-half the compensation allowed by Section 53.140, supra, against the county should be presented to the county court by the same method as other claims against the county, in order that it might be audited, adjusted and settled in the manner provided by Section 50.160 RSMo 1949, reading as follows:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; to issue all necessary process to secure the attendance of any person, whether party or witness, whom they deem it necessary to examine in the investigation of any accounts; and in order to procure the exhibition or delivery to them of any accounts, books, documents or other papers, the said court may issue process directed to the person in whose custody or care the said accounts, books, documents or other papers may be, commanding him to deliver or transmit the same to said court, which process shall be served by

Honorable George Q. Dawes

the sheriff; and the said court may examine all parties and witnesses on oath, touching the investigation of any accounts, and if any person, being served with such process shall not appear according to the command thereof, without reasonable cause, or if any person in attendance at any hearing or proceeding shall, without reasonable cause, refuse to be sworn or to be examined, or to answer a question or to produce a book or paper, or to subscribe or swear to his deposition, he shall be deemed guilty of a misdemeanor; provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers."

Unfortunately we have no Missouri statutes or court decisions construing the terms "audit, adjust and settle" as used in Section 50.160, supra. From the language used therein it does not appear that the legislative intent was that such words should be given any special or technical meaning, or that they should be given any other than their plain or ordinary meaning; hence we have assumed that they were intended to be used in their ordinary sense.

In the case of New York Catholic Protectory v. Rockland County, 144 N.Y.S. 552, the meaning of the term "to audit" was given at l. c. 556, where the court said:

"* * * To 'audit' is to hear, to examine an account and in its broader sense, it includes its adjustment or allowance, disallowance, or rejection. People ex rel. Brown v. Board of Appt., 52 N.Y. 227. * * *"

In view of the common or ordinary meaning of the terms used in Section 50.160, supra, when the assessor's claim for compensation is presented, it is the duty of the county court to examine such claim, to satisfy itself as to the correctness of the statements made, and then to allow, or disallow the claim in whole or in part and order a warrant drawn upon the county treasurer in any sum found due the assessor. When the county court passes upon the correctness of the claim against the county, under the provisions of this section, it must be remembered that the county court is a court of limited jurisdiction, that it has authority to act only as the fiscal agent of the county, and has no powers in that particular other than those provided by this or other applicable sections of the statute.

In discussing the powers of the county court in the case of

Honorable George Q. Dawes

Missouri Electric Power Co. v. City of Mountain Grove, 176 S.W.
(2) 612, at l.c. 615 the court said:

"The authorities are uniform to the effect that county courts possess only limited jurisdiction. Outside the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute. * * *"

Section 137.245 RSMo 1949, requires the assessor to make out and return a copy of the assessor's books to the county court, and reads as follows:

"1. The assessor, except in St. Louis city, shall make out and return to the county court, on or before the thirty-first day of May in every year, a fair copy of the assessor's book, verified by his affidavit annexed thereto, in the following words, to wit:

" , being duly sworn, makes oath and says that he has made diligent efforts to ascertain all taxable property being or situate, on the first day of January last past, in the county of which he is assessor; that, so far as he has been able to ascertain the same, it is correctly set forth in the foregoing book, in the manner and the value thereof stated therein, according to the mode required by law.

"2. The clerk of the county court shall immediately make out an abstract of the assessment book, showing aggregate footings of the different columns, so as to set forth the aggregate amounts of the different kinds of real and tangible personal property and the valuation thereof, and forward the same to the state tax commission. Upon failure to make out and forward such abstract to the state tax commission on or before the twentieth day of June, the clerk shall, upon conviction be deemed guilty of a misdemeanor."

From the contents shown in the assessor's books, filed as provided by Section 137.245, the county court is enabled to determine the amount of compensation due the assessor for his services at the rates provided by Section 50.160, supra. Until

Honorable George Q. Dawes

the assessor's book has been completed the assessor would not be entitled to receive any fees, nor would the county be liable to pay anything, nor could it be determined the amount of compensation due the assessor. None of the statutes quoted above, and particularly Section 50.160, supra, authorize the county court to pay the assessor in advance, or for services to be performed at some later date. Said section prescribes the method by which the county court shall pay the assessor, and it is our contention that the court would have no authority to pay the assessor in any other manner or by any other method than those prescribed by the statutes. In support of our contention, we call attention to the cases of State v. Montgomery, 186 S.W. (2d) 553, and Nodaway County v. Kinder, 344 Mo. 795.

In State v. Montgomery, one, Moser, had been declared insane under a statute authorizing a county court to have jurisdiction of sanity hearings. Subsequently a proceeding to have Moser's sanity restored was instituted before the same county court which had adjudged him insane. The county court dismissed the petition, for the reason that it believed it had no jurisdiction of the matter. The circuit court, to which the case was later appealed, ordered the county court to enter judgment discharging Moser. From the circuit court judgment the judges of the county court appealed. In discussing the lack of jurisdiction in the county court to proceed in restoration of sanity hearings, the Kansas City Court of Appeals said at l. c. 556:

"There being no statute authorizing the county court to conduct such a hearing as was requested in this case, and there being no statute from which we can reasonably say such authority may be implied, and the county court not having any common law jurisdiction, even if the common law would supply any relief to the petitioner, we reluctantly conclude that the county court had no jurisdiction in this matter and properly dismissed the petition. * * *"

The county court has the power to issue a warrant to the assessor for the compensation for performance of his official duties in making the assessment books, only in accordance with the statutes quoted above.

None of said statutes, nor do any others, authorize the county court to compensate the assessor, or to give him an advancement

Honorable George Q. Dawes

of compensation for services to be performed in the future. Said sections prescribe a particular procedure which must be followed in such instances, and the county court is without legal authority to compensate the assessor in any other manner.

Therefore, in answer to the second inquiry, it is our thought that the county court is legally unauthorized to advance any part of a county assessor's compensation not earned and before settlement.

CONCLUSION

It is, therefore, the opinion of this department that: (1) any assignment by a county officer of his future unearned compensation is null and void; and (2) a county court is legally unauthorized to advance any part of a county assessor's unearned compensation and before settlement with said court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

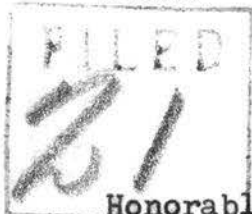
Very truly yours,

JOHN M. DALTON
ATTORNEY GENERAL

PNC/ld/ma

CONSERVATION
COMMISSION:
FISH:

Proprietor of private pond stocked with artificially propagated fish obtained from without the State of Missouri is required to have a Wildlife Breeder's permit.



July 6, 1955

Honorable Dick B. Dale, Jr.
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Throughout this County there are a number of commercial fishing lakes and ponds, operated for profit by the landowners. These lake owners charge a set fee, usually One Dollar per pole, for fishing in their lakes; and no license issued by the Conservation Commission is required of the individual fisherman. The fish to supply these ponds are legally obtained from outside of the State of Missouri. There were no wild stock fish in these lakes and ponds prior to the time that the purchased fish were placed therein. All of the lake owners, except one, have purchased Wildlife Breeder's permits as authorized by Section 51 of the Wild Life Code of Missouri. Section 51 provides in part as follows, to-wit:

" 'Sec.51. Wildlife held in captivity, permits, privileges. -- Wildlife may be propagated and held in captivity by the holder of a wildlife breeder's permit, as provided herein. * * * Wildlife so propagated and held may be used, sold, given away, transported or shipped at any time, but the same shall be accompanied by a written statement by the permittee giving his permit number and showing truly the kind and number of each species sold, given away, transported or shipped, the name and address of the recipient, and that as to the

Honorable Dick B. Dale, Jr.

same he has fully complied with this code. Wildlife propagated in captivity or transported into this state may be liberated to the wild only under the specific permission and supervision of the Commission. The operation of any such enterprise in violation of this code or in any manner as a cloak or guise to nullify or make difficult the enforcement of this code shall be cause for the suspension or revocation of such permit.'

"The question concerning this Office is whether such a commercial fish pond owner is required to buy a Wild Life Breeder's permit under Section 51 of the Wildlife Code of Missouri.

"In the event that the foregoing question is answered in the negative and that a Wildlife Permit is not necessary to conduct a commercial fishing lake or pond, the further question arises as to whether a Retail Vendor's Permit is required as provided under Section 50 of the Wildlife Code of Missouri. Section 50 reads in part as follows, to-wit:

" 'Sec. 50. Commercial fish: turtles: limits, sale. -- * * * Commercial fish taken from the aforementioned waters, or legally obtained from without the state, may be possessed, transported and sold by the holder of a wholesale fish dealer's or retail vendor's permit in any numbers during the prescribed open season. The holder of a wholesale fish dealer's or retail vendor's permit shall conduct such business exclusively at the location specified in the permit; provided, however that the holder of a retail vendor's permit may sell only cooked fish at locations other than that specified in the permit. The holder of a wholesale fish dealer's permit may sell, transport, ship, distribute and deliver such fish to an authorized retail vendor, or other wholesale fish dealer, and authorized retail vendors may transport, sell and deliver same exclusively to consumers.'

Honorable Dick B. Dale, Jr.

"These two questions when reduced to a practical approach would appear to be answered by an interpretation of the word 'propagated' which is found in Section 51. As a practical matter there would be naturally some breeding from the time they are placed in the pond and the time they are caught and removed from the pond. It is contended by the refusing commercial pond owner that the fish are caught and removed from the pond before there is an opportunity for propagation or the breeding process to be completed. He further contends that he has no intent to breed fish but that his intention is to hold fish in captivity so that they can be caught and removed by fishermen. Even assuming the foregoing contentions are correct, it would seem to follow that if a commercial fish pond owner is not a breeder of fish, he is certainly a vendor of fish and should be required to purchase a retail vendor's permit under Section 50 of the Wild life Code of Missouri.

"It would appear from a reading of the Wildlife Code of Missouri, that a commercial fish pond owner should be required to purchase a permit from the Conservation Commission; however, it is not clear to this Office whether the Breeder's Permit or the Vendor's Permit is required.

"Any opinion and information from your Office concerning this matter will be greatly appreciated.

"Thanking you for your kind cooperation in this matter, I remain"

At the outset, it becomes pertinent to your opinion request to determine whether fish having the characteristics and being held in the manner described in your letter of inquiry are "Wild-life" within the meaning of that term as used in the Wildlife Code of Missouri.

Honorable Dick B. Dale, Jr.

In this regard your attention is directed to the following definition of this term appearing in subsection (3) of Section 252.020, RSMo 1949, reading as follows:

"As used in this chapter, unless the context otherwise requires:

"(3) The words 'wild life' shall mean and include all wild birds, mammals, fish, and other aquatic and amphibious forms, and all other wild animals, regardless of classification, whether resident, migratory or imported, protected or unprotected, dead or alive; and shall extend to and include any and every part of any individual species of wild life."

We have also examined the definitions contained in the Wildlife Code of Missouri containing the rules and regulations of the Conservation Commission as revised to January 1, 1955, and find no other or further definition of the term therein. In this opinion we, therefore, accord to the term the meaning found in the statutory definition and assume that the Conservation Commission used it in like sense when incorporated in the rules and regulations of that body.

From the foregoing we conclude that fish are "wildlife," in which conclusion we are further supported by the holding of our Supreme Court in State v. Weber, 205 Mo. 36, in which it was held that the nature of fish and animals constituted the determinative factor as to whether they were, or are, fereae naturae.

We therefore examine, in addition to the sections of the Wildlife Code mentioned in your letter of inquiry, certain other provisions contained therein which we deem germane. Your attention is directed to Section 38 of such code reading as follows:

"Sec. 38. Permits required unless otherwise provided. - Wildlife may be pursued, taken, transported, shipped, bought, sold, given away, stored, served, used or possessed only by a person who at the same time has in possession the prescribed permit to do so or who is specifically allowed by this code to do so without permit." (Underscoring ours)

Honorable Dick B. Dale

Also, to subsection (B) of Section 46, reading as follows:

"(B) Wildlife Breeder's Permit \$20.00.-
To maintain and operate a wildlife farm,
or a wildlife exhibit, and to exercise
the privileges of a wildlife breeder as
herein permitted, upon the payment of a
wildlife breeder's permit fee of twenty
dollars (\$20.00)."

It therefore appears that the wildlife breeder's permit described under Section 51 and for which a fee is prescribed under subsection (B) of Section 46, is required for the proprietor of a pond such as is described in your letter of inquiry.

Passing on to consideration of the retail vendor's permit referred to in Section 50 of the Wildlife Code, it is to be noted that such permit is concerned with fish which might be "sold." It is our thought that the fish found in the ponds described in your letter of inquiry are not "sold" in the sense that this word is used in Section 50 of the Wildlife Code. It seems to us that no "sale" of the fish as such is consummated. On the contrary, what is actually "sold" is the privilege of fishing in the pond with the incidental right to retain such fish as may be caught. There being no sale of the fish as such, it, therefore, seems that this quoted section is inapplicable.

CONCLUSION

In the premises, we are of the opinion that the proprietor of a wholly owned pond stocked with artificially propagated fish obtained from sources without the State of Missouri is required to obtain the wildlife breeder's permit referred to in Section 51 of the Wildlife Code of Missouri.

We are further of the opinion that the provisions of Section 50 of the Wildlife Code, with respect to retail vendor's permits, are inapplicable for the reason that no "sale" of fish is made by the proprietor of the pond.

Honorable Dick B. Dale, Jr.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

John M. Dalton
Attorney General

WFB,Jr:lc

PROBATE COURT: In instances where the probate court appoints
INDIGENT INSANE: an attorney to represent an indigent insane in
COUNTY COURT: a proceeding before the probate court, the fixing of the fee of such an attorney is a matter solely within the authority of the probate court; such fee so fixed is a part of the cost which should be paid by the county when payment cannot be obtained out of the estate of the insane person; refusal to pay the full amount of the fee fixed by the probate court constitutes a rejection on the part of the county court, from which an appeal can be taken, to the circuit court within ten days; although no appeal is taken from the action of the county court, the county court may, at a subsequent term, change its order regarding this matter and make an additional payment in those cases where the \$10.00 payment was not received by the claimant as full payment of his claim against the county.

FILED

21

August 23, 1955

Honorable Dick B. Dale, Jr.
Prosecuting Attorney
Courthouse
Richmond, Missouri

Dear Sir:

Your recent request for an official opinion raises three questions, the first of which is:

- "1. Whether the Probate Court of the County Court sets the fee allowed to Attorneys who are appointed by the Probate Court to represent indigent alleged insane persons in insanity proceedings before the Probate Court?"

There can be no question but that the probate court sets the fee of the attorney who is appointed to represent an indigent insane person in sanity proceedings before the probate court.

As noted by you, paragraph 2 of Section 458.060 RSMo 1949, states:

- "1. In proceedings under this chapter, the alleged insane person must be notified of the proceedings by written notice stating the nature of the proceeding, time and place when such proceedings will be heard by the court, and that such person is entitled to be present at said hearing and to be assisted by counsel, such notice to be signed by the judge or clerk of the court under the seal of

Honorable Dick B. Dale, Jr.

such court, and served in person on the alleged insane person a reasonable time before the date set for such hearing.

- "2. If no licensed attorney appears for the alleged insane person at such hearing, then the court shall appoint an attorney to represent such person in such proceeding, and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

You also correctly state that this fee shall be taxed as part of the cost, and paid by the county, if the estate of the insane person be not sufficient for this purpose.

Section 458.080, RSMo 1949, reads:

"When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

On November 22, 1949, this department rendered an opinion, a copy of which is enclosed, to W. A. Despain, Judge of the Probate Court of Shannon County, in which we held as above.

Your second question reads as follows:

"Assuming that the Probate Court does have the sole authority and discretion in the setting of Attorneys' fees for Attorneys appointed by him to represent indigent alleged insane persons, the second question is whether the County Court shall reissue Warrants in the amount of \$25. (which sum was allowed by the Probate Court as an Attorney fee) to replace two Warrants in the amount of \$10. each which were issued by the County Court and refused by members of the local Bar, and which checks have never been cashed to date?"

Since we received your letter you have informed us, orally, that the situation set forth in your second question is that two sanity hearings were held, in each of which the indigent insane was represented by an attorney appointed by the probate court; that in each instance the probate court allowed a fee of \$25.00, which was taxed as cost in the case, but that the county court, disregarding the amount of the fee fixed by the probate court, issued warrants for \$10.00 each, neither of which has been cashed.

Honorable Dick B. Dale, Jr.

In view of our answer to your first question, it follows that the county court should have issued these two warrants for \$25.00 each, the amount fixed by the probate court, which had sole authority to fix these fees, which authority should have been respected by the county court. We believe that the issuance of the two \$10.00 warrants was error on the part of the county court. However, in regard to any present or future action in the matter, we direct attention to Section 49.240 RSMo 1949, which reads:

"If any account shall be presented against a county, and the same, or any part thereof, shall be rejected by the county court, the party aggrieved thereby may prosecute an appeal to the circuit court in the same manner as in other cases of appeal from the county to the circuit court; and the circuit court shall proceed to hear, try and determine the case anew, without regarding any error, defect or other imperfections in the proceedings of the county court."

Also to Section 49.250 RSMo 1949, which reads:

"An appeal in any such case may be taken within ten days after the rejection of the claim by the county court, and upon such appeal being taken, the clerk of that court shall certify the case and the papers connected therewith to the circuit court, in the manner prescribed by law for certifying appeals in probate cases."

The issuance and attempted presentation of the two \$10.00 warrants constitute, we believe, a rejection by the county court of a "part thereof" of the \$25.00 account presented to it for payment. We further believe that the attorneys in whose favor the warrants were drawn could have appealed to the circuit court within ten days after the warrants were presented to and rejected by the county court, according to Section 49.250, supra, but that having failed to do so within that time they cannot now do so. However, we do believe that the county court has the authority to reconsider its action in this respect, and to correct any error which it may feel that it has committed, and that such correction could take the form of recalling the \$10.00 warrants and issuing \$25.00 warrants in their stead.

In the case of *Boggs v. Caldwell County*, 28 Mo. 586, at l.c. 589, the court stated:

"We do not see any objection to an appeal from the rejection of this account at the March Term in 1858, although it had been previously rejected at a prior term. The county court permitted

Honorable Rick B. Dale, Jr.

the plaintiff to introduce new proof, and gave him to understand that, by such permission, they were still open to conviction. He could have appealed from the original order of rejection, but when he presented his claim a second time by leave of the court, no objection was interposed of res adjudicata. The objection, if it would have been available, may be considered as waived. The rejection of the claim was not like a judgment in a suit between individuals, which the court could not on its own motion open at a subsequent term, but the county court were the commissioners or agents of the county, and could, on behalf of the county, waive any advantage the county might have."

The above is an old case, but so far as we can find it has never been repealed or modified by subsequent decisions.

Your third question is:

"The third question concerns seven Warrants issued by the County Court in the amount of \$10. each, where the Probate Court has allowed a fee of \$25., which Warrants have already been accepted and cashed by the Attorneys appointed by the Probate Court to act in insanity matters?"

In regard to this, we direct attention to the case of Noll v. Harrison County Bank, 11 S.W.(2d) 1076; at l.c. 1077 of its opinion the court stated:

"It is well settled that payment of a part of a debt does not discharge the whole. Part payment operates only as a discharge pro tanto in the absence of a consideration for the release of the residue."

Also to page 246, Section 39, C.J.S., Vol. 70, which states in part:

"Part payment of a debt ordinarily does not bar a claim for the balance unless it is accepted with knowledge that it is not the full amount due and with the intention that the debt be thereby discharged."

In the case of Jones v. Southern Natural Gas Co., 36 Southern (2d) 34, at l.c. 38, the court stated:

"* * * There is nothing to prevent a creditor from accepting from his debtor in full payment

Honorable Dick B. Dale, Jr.

of the debt due an amount less than is due, provided, of course, that the acceptance is made with full knowledge that it is not the full amount due, and with the intention that it shall discharge the debt.* * *

In the case of Skinner v. Johnson, 74 S.W.(2d) 71, at l.c. 73, the court stated:

"This court, in the case of Union Biscuit Company, appellant, v. Springfield Grocer Company, respondent, 143 Mo. App. 300, loc. cit. 306, 126 S.W. 996, 998, specifically and clearly defined the word 'payment' in its legal sense, as follows: 'The word "payment", in its legal sense, has a well-defined meaning. In order to constitute payment, as that word is used in law, there must be (1) delivery; (2) by the debtor or his representatives; (3) to the creditor or his representatives; (4) of money or something accepted by the creditor as the equivalent thereof; (5) with the intention on the part of the debtor to pay the debt in whole or in part; and (6) accept as payment by the creditor.'* * *

In the case of Temple v. Jones, Son & Co., 19 S.E.(2d) 57, at l.c. 63, the court stated:

"Payment of a debt involves both tender by the debtor and acceptance by the creditor, with the intention on the part of the debtor to pay the debt in whole or in part, and so accepted as payment by the creditor;* * * Hall Building Corporation v. Edwards, 142 Va. 209, 128 S.E. 521, 523."

Therefore, if the persons, or any of them who received and cashed these seven \$10.00 warrants, accepted them without protest, and indicated by their words and actions that the warrants were received in full payment, although with knowledge that the probate court had allowed a fee of \$25.00, then we believe that the matter is closed and that the county court would not be authorized to make any adjustment as to them. If, however, they, or any of them, protested the amount of the warrants and indicated by their words and actions that they were accepting the \$10.00 payment merely as part payment on the \$25.00 claim, we do not believe that the county court is precluded from paying them an additional \$15.00.

Honorable Dick B. Dale, Jr.

CONCLUSION

It is the opinion of this department that in instances where the probate court appoints an attorney to represent an indigent insane in a proceeding before the probate court, that the fixing of the fee of such an attorney is a matter solely within the authority of the probate court; that such fee so fixed is a part of the cost which should be paid by the county when payment cannot be obtained out of the estate of the insane person; that refusal to pay the full amount of the fee fixed by the probate court constitutes a rejection on the part of the county court from which an appeal can be taken to the circuit court within ten days; that although no appeal is taken from the action of the county court, the county court may, at a subsequent term, change its order regarding this matter and make an additional payment in those cases where the \$10.00 payment was not received by the claimant as full payment of his claim against the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

Enc. W. A. Despain
11-22-49

RECOVERY OF OVERPAYMENT
OF SALARY:

DEPUTY'S SALARY:

County may recover overpayments paid public officers. The county court is not personally liable. The statute of limitations applies to counties.

October 28, 1955

81155
21
Honorable George Q. Dawes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

In your recent request for an official opinion from this office you state:

"During the tenure of office of the county clerk in 1947 through 1950, the county court paid out for additional services for deputies an amount in excess of the amount allowed under the statute. Under Section 51.460(2) and (6) the court is allowed to pay a deputy clerk \$1400.00, but the court paid as much as \$300.00 to \$400.00 annually more than that allowed.

"My question is, 'Upon whom does the responsibility for overpayment fall?' Is the county clerk who was in office at the time liable for the sums paid out over the statutory allowance, or is the county court responsible? If the county clerk is liable, when did the statute of limitations begin to run on this obligation? Is that sum which was paid prior to 1950 outlawed?"

To begin with, we shall assume that you use the terms, "liable" and "responsible" interchangeably. The action of the county court in allowing pay in excess of the statutory limitations we shall conclude was due to a mistake of law or of fact, and we shall conclude that the court did not act maliciously, fraudulently or corruptly in view of the fact that your letter does not suggest such. Nevertheless, the action by the court was illegal and, therefore, the money may be recovered from the person or persons who received it.

In the case of Saline County v. Wilson, 61 Mo. 237, the county court had audited a claim in blank and ordered a war-

Honorable George Q. Dawes

rant in blank, with instructions to the clerk to insert the proper amount in the warrant when the claimant rendered his final account. The claim was excessive. A warrant was issued. The county sued to recover from the payee. The court said that the county court, regardless of "however pure its motives" acted beyond the scope of its authority and that

"County courts are only agents of their respective counties in the manner and to the extent prescribed by law. So long as they continue to tread in the narrow pathway allotted to their feet by legal enactment, their acts are valid, but whenever they step beyond, their acts are void."

Therefore, the court held that:

"* * * there could arise no doubt but that an action for money had and received, which is the nature of the present suit, would lie for the recovery of the money thus obtained."

In Consolidated District No. 2 of Pike County v. Cooper et al., 28 S. W. (2d) 384, the question arose as to the right of one school district to recover from another school district and the county treasurer money belonging to the plaintiff district but paid out to the defendant district under a mistake of law. The defense advanced two theories; one was that money honestly paid out under a mistake of law cannot be recovered. The court said:

"The first of these contentions can be put aside with but scant comment, for the rule that money honestly paid and received, with full knowledge of all the circumstances, but under a mistaken conception of the law, cannot be recovered back, does not apply where all the participants were officers or official bodies, acting solely in their official capacities, since no act of approval, acquiescence, or settlement can be permitted to extend the authority

Honorable George Q. Dawes

of such officers to cover an unlawful act. Lamar Township v. City of Lamar, 261 Mo. 171, 169 S. W. 12, Ann. Cas. 1916D 740; State ex rel v. Scott, 270 Mo. 146, 192 S. W. 90; State ex rel v. Hackmann, 305 Mo. 342, 265 S.W. 532; State ex rel v. Dearing, (Mo. App.) 274 S. W. 477."

See also, State v. Weatherby, 344 Mo. l.c. 856, and Am. Jur., Payments, Section 210.

In the case of County of Nodaway v. Kidder, 344 Mo. 795, the court held that public policy requires that a public officer be denied additional compensation for performing official duties, and that when a public official wrongfully receives public funds, although paid to him under an honest mistake of law, he must restore such funds. Thus, in answer to your question, "Upon whom does the responsibility for overpayment fall?", we conclude that it falls upon the person who received it.

In the case of State ex rel v. Diemer, 255 Mo. 336, in which the question arose as to the personal liability of the members of the county court for overpayment of the salary of the county engineer, the court said, l.c. 354:

"The premises considered it becomes apparent that, although we have held that in the matter of allowing claims against the county they act in a public ministerial, administrative, or auditing capacity, yet in their performance of ministerial duties in allowing claims their acts partake of the nature of judicial acts and are so related thereto in color and substance that they may be deemed not inaptly quasi-judicial. On that account they are protected from personal liability except in the inflamed case of fraud, corruption or malice."

This case was followed in Carter County v. Huett, 303 Mo. 194, when the question of personal liability of the members of the county court arose after overpayment of the county prosecutor's salary.

Honorable George Q. Dawes

Therefore, in view of our stated premise that we conclude there was no malice, fraud, or corruption here, it is our opinion that the members of the county court are not personally liable.

From these cases cited and from an official opinion, a copy of which is enclosed, rendered by this office October 22, 1953, to the State Auditor, we conclude that the county clerk is not liable. In that opinion, Section 51.450(6) was construed when the question arose as to whether or not that section became immediately applicable upon its passage by the Sixty-seventh General Assembly. It was held that it did become immediately applicable because the compensation therein provided was for the deputy, not for the clerk.

Section 51.460(6) is identical in the pertinent aspects with Section 51.450(6), and Section 51.460 currently reads as it has since 1947.

Such a suit for recovery can be brought in the name of the county. Section 50.160, RSMo 1949, gives the court power to enforce collections of money due the county. On this point see, also, Cole County v. Ballmeyer, 101 Mo. 57, 13 S. W. 687; see, also, Counties, Digest, Key No. 217.

You ask further, if the county clerk is liable, when does the statute of limitations begin to run. On this point, of course, as we pointed out above, the county clerk is not personally liable. It would seem that the statute began to run against the county from the time the salary allowed exceeded the statutory limit, because that is when a cause of action for its return arose. St. Louis County ex rel Scott v. Marvin Planing Mill Co., 228 Mo. App. 1048, 58 S. W. (2d) 769. Since the cause of action arose then the statute of limitations commenced to run from that time. Cleveland v. Laclede County Christy Clay Products Co., 129 S.W. (2d) 12; see, also, Am. Jur., Limitation of Actions, Section 113.

We are enclosing an official opinion of this office dated April 1, 1943, to John H. Keith, which concludes that counties are subject to the statute of limitations.

It is our opinion also that the five years, not the three years, section would be applicable in an action for the recovery of the subject overpayments. Such an action would be

Honorable George Q. Dawes

upon a "liability" as mentioned in Section 516.120(1), RSMo 1949, and would not be "against * * * an officer, upon a liability incurred by doing an act in his official capacity and in virtue of his office * * *" as mentioned in Section 516.130(1). Thus those payments made more than five years prior to the filing of any action would be outlawed.

CONCLUSION

From the foregoing, we conclude that in the present case:

- (1) The deputy county clerk who received the overpayment of salary from the county court is the person liable to refund it;
- (2) That the county clerk is not liable;
- (3) That, absent fraud, malice or corruption, the members of the county court are not personally liable;
- (4) That the county may sue in its own name for the recovery of excess salaries paid;
- (5) That the county is subject to the five years' statute of limitations.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Yours very truly

John M. Dalton
Attorney General

RSN:lc

Enclosures: Opinion to John H. Keith, dated April 1, 1943
Opinion to Haskell Holman, dated October 22, 1953

DRAINAGE DISTRICTS: Eight questions relating to the powers and duties of boards of supervisors of drainage districts organized in circuit court.



March 24, 1955

Honorable Richard J. DeCoster
State Representative
Lewis County
Room No. 415
Jefferson City, Missouri

Dear Mr. DeCoster:

Reference is made to your request for an official opinion of this department embodying eight separate questions relating to the powers and duties of the boards of supervisors of drainage districts organized in circuit courts. For convenience and clarity in the preparation of the opinion, we have grouped the related questions into several units.

Questions 1, 2 and 3 of your letter of inquiry read as follows:

"1. May the Board of Supervisors invest money of the district accumulated from maintenance tax and rental of district owned land? (242.210 (5)).

"2. If so, are there any requirements for or limitations on such investments and, specifically, may such investments be made in Building and Loan Associations?

"3. If the Board of Supervisors may invest such funds, may they invest in out of state institutions?"

It is the duty of the treasurer of drainage districts of the nature referred to in your letter of inquiry to keep funds belonging to such districts in a depository selected by the Board of Supervisors. His action in this regard is governed by the provisions of Subsection 5 of Section 242.210, RSMo 1949, which reads as follows:

Honorable Richard J. DeCoster

"5. Said treasurer shall keep all funds received by him from any source whatever deposited at all times in some bank, banks or trust company to be designated by the board of supervisors. All interest accruing on such funds shall, when paid, be credited to the district."

Being officers created by statute, the powers and duties thereof must be strictly construed and be limited to those specifically enumerated or necessarily implied in connection with the discharge of official duties. Having specifically enumerated the types of financial institutions, viz., "bank, banks and trust companies" in which deposit of funds belonging to the district may be deposited, we can find no authorization for investment in different types of such institutions.

No limitation, however, appears that such designated institutions be located within the state of Missouri. Therefore, absent such limitation, it is our thought that the board of supervisors may designate as a depository for district funds one or more of the enumerated types of financial institutions located outside the State of Missouri.

Questions 4, 5 and 6 of your letter of inquiry read as follows:

"4. Does the Board of Governors have the authority to sell land given or abandoned to it? (242.620 - of land acquired at delinquent tax sale).

"5. May the Board of Governors sell district land to one of the members of the Board?

"6. If the answer to question No. 5 is in the affirmative, may the Board members to whom the land is being sold cast the deciding vote in favor of selling?"

These questions which relate to the power of disposal of lands acquired by the drainage district we believe to be answered in part by the following portion of Section 242.620, RSMo 1949. This statute relates to the protection of the lien for drainage taxes assessed on behalf of such drainage district and authorizes the acquisition of lands upon which such taxes have become delinquent by the drainage district. After so providing, the

Honorable Richard J. DeCoster

statute contains the following pertinent authorization with respect to the disposition of such real property:

"1. To protect said lien of said drainage taxes upon the lands and other property against which said taxes shall be levied, in any case where delinquent lands are offered for sale for such delinquent taxes, and the amount of the tax due, together with interest, cost, and penalties is not bid for the same, the board of supervisors shall have authority to bid or cause to be bid, not to exceed the whole amount due thereon, as aforesaid, in the name of the drainage district, and in case such bid is the highest bid, the sheriff shall sell and convey such lands to such drainage district, and such lands shall thereupon become the property of the drainage district, and may be held, disposed of, and conveyed by the board of supervisors at such price and on such terms, as in the discretion of the board of supervisors may be to the best interest of the district."

Paragraph 2 of the same statute reads as follows:

"If such lands, or other property, are sold by the board of supervisors the purchasers thereof shall take the same subject to all said drainage taxes thereafter becoming due, the same as all other lands and other property in the district."

Here appears a clear authorization to dispose of real property acquired in connection with the protection of the lien of the drainage district for drainage taxes and by implication, at least, a recognition of the authority of the board of supervisors thereof to sell and convey other property owned by the drainage district.

Of course, in making any disposition of such property, the board of supervisors will of necessity be governed by general laws applicable to public contracts. It is our thought that lands belonging to the drainage district may not be sold to a member of the board of supervisors thereof. It is our belief

Honorable Richard J. DeCoster

that such a contract of sale would be void as against the public policy of the state. In this regard we direct your attention to the case of Githens v. Butler County, reported 165 S. W. (2d) at page 650, from which we quote, l. c. 652:

"The directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board of legislative body is precluded from entering into a contract with that body." 6 Williston, Contracts, Sec. 1735, p. 4895. The basis of this common law rule is that it is against public policy (State ex rel. Smith v. Bowman, 184 Mo. App. 549, 170 S. W. 700) for a public official to contract with himself. 'At common law and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of (or) council. * * The fact that the interest of offending officer in the invalid contract is indirect and is very small is immaterial. * * * It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, Sec. 773; 46 C. J. Sec. 308; 22 R.C.L., Sec. 121; State ex rel. Streif v. White, Mo. App., 282 S. W. 147; Witmer v. Nichols,

Honorable Richard J. DeCoster

320 Mo. 665, 8 S. W. 2d 63; Nodaway County
v. Kidder, 344 Mo. 795, 129 S. W. 2d 857."

Having reached this conclusion, it becomes unnecessary to further consider question No. 6.

Question No. 7 of your letter of inquiry reads as follows:

"7. Do such drainage districts now have the authority to enter into an agreement with the Federal Government under the plan set out in Public Law 566 enacted by the 83rd Congress?"

We have examined Public Law 566 of the 83rd Congress. Substantially, it provides for financial assistance to be granted by the Federal Government through the agency of the Secretary of Agriculture of the United States in cooperative measures relating to flood prevention and conservatbn, development, utilization and disposal of water in connection with agricultural activities. The types of such activities for which such assistance may be given are defined in the law in the following language:

"For the purposes of this Act, the following terms shall mean:

"* * * * *

"'Works of improvement'--any undertaking for--

(1) flood prevention (including structural and land-treatment measures) or

(2) agricultural phases of the conservation, development, utilization, and disposal of water

in watershed or subwatershed areas not exceeding two hundred and fifty thousand acres and not including any single structure which provides more than five thousand acre-feet of total capacity. No appropriation shall be made for any plan for works of improvement which includes any structure which provides more than twenty-five hundred acre-feet of total capacity unless such plan has been approved by resolutions adopted by the Committee on Agriculture and Forestry of the Senate and the Committee on Agriculture of the House of Representatives,

Honorable Richard J. DeCoster

respectively. A number of such subwatersheds when they are component parts of a larger watershed may be planned together when the local sponsoring organizations so desire."

"'Local organization' -- any State, political subdivision thereof, soil or water conservation district, flood prevention, or control district, or combinations thereof, or any other agency having authority under State law to carry out, maintain and operate the works of improvement."

To determine whether a drainage district of the nature described in your letter of inquiry is a "local organization" within the meaning of that term as defined by Public Law 566, we have given further attention to statutes relating to the powers of such drainage districts. We direct your attention particularly to Section 242.190, RSMo 1949, which reads as follows:

"In order to effect the drainage, protection and reclamation of the land and other property in the district subject to tax the board of supervisors is authorized and empowered to clean out, straighten, widen, change the course and flow, alter or deepen any ditch, drain, river, watercourse, pond, lake, creek, bayou or natural stream in or out of said district; to fill up any creek, drain, channel, river, watercourse or natural stream; and to concentrate, divert or divide the flow of water in or out of said district; to construct and maintain main and lateral ditches, canals, levees, dikes, dams, sluices, revestments, reservoirs, holding basins, floodways, pumping stations and syphons and any other works and improvements deemed necessary to preserve and maintain the works in or out of said district; to construct or enlarge or cause to be constructed or enlarged any and all bridges that may be needed in or out of

Honorable Richard J. DeCoster

said district across any drain, ditch, canal, floodway, holding basin, excavation, public highway, railroad right of way, tract, grade, fill or cut; to construct roadways over levees and embankments; to construct any and all of said works and improvements across, through or over any public highway, railroad right of way, track, grade, fill or cut in or out of said district; to remove any fence, building or other improvements in or out of said district, and shall have the right to hold, control and acquire by donation or purchase, and if need be, condemn any land, easement, railroad right of way, sluice, reservoir, holding basin or franchise in or out of said district for right of way, holding basin or for any of the purposes herein provided, or for material to be used in constructing and maintaining said works and improvements for draining, protecting and reclaiming the lands in said district.

"2. Said board of supervisors shall also have the power and authority to hold and control all water power created by the construction of works of said district, and shall have power to construct and maintain hydroelectric power plant or plants for the purpose of developing such power for the use of said district, and to use any funds in the treasury of said district not otherwise appropriated for the construction and maintenance of such power plant or plants, and the said board of supervisors shall have the right and authority to lease any surplus power in excess of that required for the uses of said district, and the proceeds of such lease or leases shall be converted into the treasury of said district.

"3. Said board shall also have the right to condemn for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the commissioners assessing benefits and damages

Honorable Richard J. DeCoster

and shall follow the procedure that is now provided by law for the appropriation of land or other property taken for telegraph, telephone and railroad right of ways."

The foregoing, in our opinion, discloses that such a drainage district is such a "local organization" as is eligible to participate in a cooperative plan with the appropriate agent of the Federal Government, particularly in view of the complete authority which may be exercised by such drainage district acting through its board of supervisors with respect to the matters to which Public Law 566 relates.

Aside from the reasoning incorporated herein which has led to our conclusion, we find that even more definite authorization has been granted such drainage districts to engage in such cooperative enterprises. Your attention is directed to Section 16, Article VI of the Constitution of Missouri, 1945, which reads as follows:

"Co-operation by local governments with other governmental units.--Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Implementing this constitutional provision, we find that the General Assembly has enacted certain statutes providing for the exercise of such cooperative powers. That such statutes are applicable to drainage districts appears from the definition of terms found in Section 70.210, RSMo 1949, reading as follows:

"The term 'governing body' as that term is used in sections 70.210 to 70.320 shall mean the board, body or persons in which the powers of a municipality or political subdivision are vested. The term 'political subdivisions' as used in sections 70.210 to 70.320 shall be construed

Honorable Richard J. DeCoster

to include counties, townships, cities, towns, villages, school, road, drainage, sewer, levee and fire districts."

The following statute, Section 70.220, RSMo 1949, defines the scope of activities with respect to which cooperative contracts may be made. It reads as follows:

"Any municipality or political subdivision of this state, herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

We observe the limitations incorporated in the quoted statute that the "subject and purposes" of the cooperative action must be within the scope of the authority of the political subdivision entering into such cooperative agreement. As we have pointed out supra, the "subject and purposes" of the cooperative agreement provided in Public Law 566 are clearly within the scope and powers of the drainage districts of the type referred to in your letter of inquiry. It is, of course, necessary that the procedural statutes relating to the actual execution of such contracts or agreements as outlined in Sections 70.230, RSMo 1949, to 70.320, inclusive, RSMo 1949, must be followed, together with other statutes relating to drainage

Honorable Richard J. DeCoster

districts.

Question No. 8 of your letter of inquiry reads as follows:

"Who must pay for the bond required of the County Collector by Section 242.540, (4) R. S. Mo. 1949? (See also 242.640)."

Section 242.540, RSMo 1949, provides for the collection of drainage district taxes by the collector of revenue of the county wherein such district is located. Among other provisions found in this statute is paragraph 4 thereof, which reads as follows:

"4. Before receiving the aforesaid drainage tax book the collector of each county in which lands or other property of the drainage district are located shall execute to the board of supervisors of the district a bond with at least two good and sufficient sureties in a sum that is equal to the probable amount of any annual installment of said tax to be collected by him during any one year, conditioned that said collector shall pay over and account for all taxes so collected by him according to law. Said bond after approval by said board of supervisors shall be deposited with the secretary of the board of supervisors, who shall be custodian thereof and who shall produce same for inspection and use as evidence whenever and wherever lawfully requested to do."

It is quite clear that this statute contemplates the execution of a bond with personal sureties thereon. If this is correct and such procedure is followed, then, of course, no problem arises with respect to any "pay" being required for the bond.

However, no doubt your question arises by reason of the collector of revenue having elected to supply a corporate surety bond under the provisions of Section 107.070, RSMo 1949. As pertinent to your inquiry, your attention is directed to the following portion of such statute:

"* * * he may elect, with the consent

Honorable Richard J. DeCoster

and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town, village, or other political subdivision, to enter into a surety bond or bonds, with a surety company or surety companies, authorized to do business in the state of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

It will be noted in order that liability for the payment of the premium on such corporate surety bond be imposed upon the public body protected thereby, there must be a concurrence of the election of the officer to supply the bond and the consent and approval of the governing body of the political subdivision. Absent the concurrence of both the officer and such governing body, no liability can be imposed upon the political subdivision for the payment of the premium thereon.

The statute here under consideration has been construed in two cases decided by the Supreme Court. Your attention is directed to *Motley v. Callaway County*, 149 S. W. (2d) 875, and *Boatwright v. Saline County*, 169 S. W. (2d) 371. In the former case the consent and approval of the giving of a corporate surety bond had been given and the county was thereupon held liable for the payment of the premium. In the latter case a contrary conclusion was reached bottomed in part upon the fact that the consent and approval of the governing body of the political subdivision, which in that particular case was the county court, had not been obtained. The gist of the decision appears in the following language:

"* * * * The statute also provides that the officer, in this case the county collector, may elect, with the consent and approval of a governing body of such county, to enter into a surety bond and the costs shall be paid by the county. It is apparent that the legislature intended the county to be liable only in case the county court consented thereto and approved the giving of such a bond.
* * * * *"

CONCLUSION

In the premises, we are of the opinion:

Honorable Richard J. DeCoster

1. The board of supervisors of a drainage district organized in circuit court may designate as a depository in which the treasurer of such district shall deposit all funds belonging to such district only some bank, banks or trust company;

2. That the board of supervisors of such drainage districts may sell and convey real and other property belonging to such district, but may not sell and convey such real or other property to a member of such board of supervisors;

3. That such drainage districts are authorized to enter into cooperative contracts or agreements with the Secretary of Agriculture as agent for the United States of the nature provided for in Public Law 566 of the 83rd Congress; and,

4. That such drainage districts are liable for the payment of the premium of a corporate surety bond supplied by a collector of revenue under the provisions of Subsection (4) of Section 242.540, RSMo 1949, only if such collector of revenue has elected to supply such corporate surety bond and that such election has the approval and consent of the board of supervisors of such drainage district.

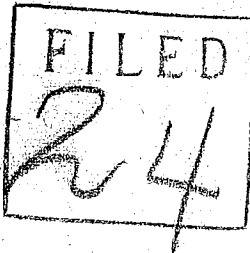
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will E. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:DA

ELECTIONS: (1) Bipartisan committee provided in Section 121.220, RSMo 1953 Cum. Supp., may not delegate its duties to subcommittees; (2) Central committee of two principal political parties may provide for attendance of representatives at inspection and examination of voting machines for use in election, under Section 121.080, RSMo 1953 Cum. Supp.; (3) Regular staff employees of St. Louis Board of Election Commissioners may be appointed to serve on bipartisan committee provided for in Section 121.220, RSMo 1953 Cum. Supp.



February 11, 1955

Honorable Michael J. Doherty, Chairman
Board of Election Commissioners
for the City of St. Louis
208 S. Twelfth Boulevard (2)
St. Louis, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The Board of Election Commissioners directed the undersigned to request an opinion of your office concerning the following: Chapter 121 and Sections 121.080 and 121.220 R. S. Mo., 1949, as amended, which said Sections present some questions that may need clarification:

"(a) Can the bi-partisan committee be made so as to function separately in each of the 28 wards, and going further, in each of the city's 783 precincts, or must the committee be obliged to function city wide only and not separate units in each ward or precinct. MUST THE BI-PARTISAN COMMITTEE APPOINTED PURSUANT TO LAW ACT AS A SEPARATE AND DISTINCT UNIT, OR CAN THE BI-PARTISAN COMMITTEE SO APPOINTED DELEGATE AND APPOINT SEPARATE SUB-COMMITTEES SO THAT EACH SUB-COMMITTEE MAY ACT AS A UNIT IN ANY ONE WARD OR WARDS, OR IN ANY ONE PRECINCT OR PRECINCTS.

Honorable Michael J. Doherty, Chairman

"(b) This also applies to the chairman of two major parties being afforded the opportunity to inspect and examine each and every machine before it is made ready for each election - again can this committee be made so as to function as separate sub-units in each of the 28 wards or separate precincts, or be obliged to function city wide as one unit only. MUST THE CHAIRMEN OF THE TWO MAJOR PARTIES ACT AS A SEPARATE AND INDEPENDENT UNIT, OR CAN THE CHAIRMAN OF THE TWO MAJOR PARTIES APPOINT SUB-CHAIRMEN TO ACT IN ANY ONE WARD OR WARDS, OR IN ANY ONE PRECINCT OR PRECINCTS.

"(c) Can any of the regular staff of the Board of Election Commissioners with equal representation of the Democratic and Republican Parties Serve on the bi-partisan committee.

* * * * *

A.

With respect to the first question you have proposed, your attention is directed to the provisions of Section 121.220, RSMo 1953 Cum. Supp., reading, in part, as follows:

"1. At the time the canvassing board convenes or as soon thereafter as it can conveniently do so, and before canvassing the returns made by precinct election officials, after each election, a bipartisan committee appointed by the election authority, shall in each precinct using voting machines, make a record of the number on the seal and the number on the protective counter, if one is provided, of each voting machine used in each election precinct in the aforementioned elections, shall open the counter compartment of each such machine and without unlocking the machine against voting, shall canvass the vote cast thereon. No person who was a candidate at such election shall be appointed to membership on the committee. The said committee shall during such time, make a canvass of independent ballots delivered

Honorable Michael J. Doherty, Chairman

to the election officers. Before making such a canvass the committee, with respect to each machine to be canvassed, shall give notice to the chief custodian of voting machines, to the recognized chairman of the chief managing committee of each party or independent body in the city which shall have nominated candidates for the election, of the time and place where such canvass is to begin, and the recognized chairman of the chief managing committee of each such party or independent body in any such city may send representatives to be present at such canvass, who shall each have the right personally to examine and make a copy of the vote recorded on the machine."

The term "canvassing board," as used in the statute mentioned, refers to the Board of Election Commissioners of the City of St. Louis. To this effect, see Section 118.590, RSMo 1949, reading, in part, as follows:

"Within eight days after the close of such election, the board, which is hereby declared the canvassing body of such city, shall publicly open all the returns left with the election commissioners * * *"
(Emphasis ours.)

One further statute we think pertinent to the inquiry now being made appears as paragraph 3 of Section 121.070, RSMo 1953 Cum. Supp., reading as follows:

"3. When not in use at an election the election authority shall have the custody of the machines."

It is a principle of law that in the absence of a statute authorizing the redelegation of authority, administrative officers may not so redelegate authority to other persons for the purpose of having the duties of such official discharged. The maxim is phrased "delegata potestas non potest delegari." We think the maxim is particularly applicable in the present circumstances, as it appears that the bipartisan committee appointed has important duties to discharge in verifying the returns of election made by precinct canvassers to the Board of Election

Honorable Michael J. Doherty, Chairman

Commissioners through the medium of comparison of such returns with the count actually disclosed by the voting machines. We therefore believe that such authority may not be redelegated by the bipartisan committee and that the General Assembly contemplated that such committee personally discharge the duties imposed upon it.

We anticipate that no undue burden will be cast upon such bipartisan committee by following the procedure outlined, inasmuch as under the custodial power which the Board of Election Commissioners has, the voting machines no doubt will be assembled at some central location for storage immediately after each election. The committee will have access to the voting machines so centrally located and the canvassing thereof should entail no extended period of time or no great amount of labor.

B.

With respect to the second question you have proposed, we direct your attention to the provisions of Section 121.080, RSMo 1953 Cum. Supp., reading, in part, as follows:

"3. Before preparing a voting machine for any election at which candidates for more than one political party are to be voted upon, or at which amendments or questions are submitted for vote, written notice shall be mailed to the chairman of the local committee of each of the two principal political parties which at the general election next preceding, cast the highest and next highest number of votes, stating the time, and place where the machines will be prepared, at which time one representative of each such political party shall be afforded an opportunity to see that the machines are in proper condition for use at the election."
(Emphasis ours.)

It is apparent that the emphasized portion of the statute does not contemplate the personal attendance of the chairman of each of the major political parties, although the attendance of such chairman is not precluded. It appears that the purpose of the statute is to afford an opportunity to each of the two principal political parties to observe the voting machines prior to their use in the elections in order to ascertain that they are in condition to function properly. The selection of

Honorable Michael J. Doherty, Chairman

such representatives, we believe, is left to the discretion of the central committees of such parties, leaving to such committees the power to determine the mode and manner of selection of such representatives.

C.

With respect to the third question you have proposed, we have carefully examined all of the statutes relating to the creation and functioning of the bipartisan committee referred to in Section 121.220, RSMo 1953 Cum. Supp. Aside from the requirement of bipartisanship, the only statutory restriction appears with respect to the membership thereof, in the language appearing in the statute quoted to the following effect:

" * * * No person who was a candidate at such election shall be appointed to membership on the committee. * * *"

In the premises, we can foresee no improper results flowing from the appointment as members of such committee of regular staff employees of the Board of Election Commissioners. We are particularly persuaded to this view by virtue of the provisions of Section 118.050, RSMo 1949, placing upon deputy election commissioners the duty, among others, of performing "all acts which the said board or any two members thereof shall direct," and Section 118.680, RSMo 1949, providing the penalty incident to the conviction of a felony for any employee or assistant of the Board of Election Commissioners falsifying or fraudulently making any return with respect to the election in which they serve.

CONCLUSION

In the premises, we are of the opinion:

(1) That the bipartisan committee provided under Section 121.220, RSMo 1953 Cum. Supp., may not redelegate its authority to a subcommittee for performance of the duties enjoined upon such committee;

(2) That the selection of the representatives to inspect and examine the voting machines prior to use in an election as provided by Section 121.080, RSMo 1953 Cum. Supp., is to be made by the central committees of the respective political parties, and that the chairmen of such committees do not have to personally discharge such duties of inspection and examination, but are not precluded from doing so; and

Honorable Michael J. Doherty, Chairman

(3) That members of the regular staff of the Board of Election Commissioners may be appointed to the bipartisan committee provided for in Section 121.220, RSMo 1953 Cum. Supp., provided that the requirement of bipartisanship in the membership of such committee be observed.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

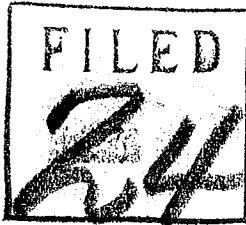
Yours very truly,

John M. Dalton
Attorney General

WFB:vtl,vlw

ELECTIONS: Registration lists required to be posted in cities
REGISTRATION: of over 600,000 need not indicate the race or
color of a registered voter.

March 11, 1955



Hon. Michael J. Doherty
Chairman
St. Louis Board of
Election Commissioners
208 South 12th Boulevard
St. Louis, Missouri

Dear Mr. Doherty:

Reference is made to your request for an official opinion
of this office wherein the following inquiry is made:

Can the Board of Election Commissioners
of the City of St. Louis legally omit the
letter "C" following the names of certain
voters carried on the registration lists,
which lists are required to be posted in
the various voting precincts of the city?

It is our understanding that the letter "C", as used,
designates the race or color of the particular voter carried
on such registration lists.

Chapter 118, RSMo 1949, provides a plan of registration
of qualified voters in cities having 600,000 inhabitants or
more. Section 118.020 provides that there shall be a regis-
tration of voters. Section 118.240 provides for the time and
place of registration. Section 118.250 designates the form
of registration records referred to as "affidavits of regis-
tration," and further requires the inclusion of certain infor-
mation concerning each applicant on the affidavit of registra-
tion. Among the information required is the "color" of the
applicant.

Section 118.390 provides that the board shall cause to
be printed copies of the list of registered voters and their

Hon. Michael J. Doherty

addresses for each precinct, and further requires the posting of one copy in four appropriate places in each precinct. Said section more fully provides, in part, as follows:

"It shall be the duty of the board immediately after the close of registration for each election to have printed direct from type such number of copies of the list of registered voters and their addresses for each precinct of the city as the board may deem necessary. Such lists shall be arranged in the same order as the precinct registers, and immediately upon completion of such lists the board shall cause one copy thereof to be posted at each of four appropriate places in each precinct. The said lists of voters shall be made available for public distribution under the rules and regulations of the board as soon as possible after the close of registration. The board may, in its discretion, prior to any election, have prepared a supplementary list of registered voters for each precinct, containing the names and addresses of voters who have transferred into the precinct since the making of the last lists of voters, and use this, together with the latest corrected list of registered voters, to satisfy the requirements of this section. * * *"

It is to be noted that the only requirement specifically relating to such lists is that the lists contain the names and addresses of the registered voters in the particular precinct. We are unable to find any other applicable statutory provision requiring that such lists contain a race or color designation. In light of these observations, we are of the opinion that the Board of Election Commissioners is not required to include on such lists a designation of race or color, and that such may be omitted on registration lists that will be published in the future.

Hon. Michael J. Doherty

CONCLUSION

Therefore, it is the opinion of this office that the Board of Election Commissioners of the City of St. Louis may omit from copies of registration lists which are required to be posted in each voting precinct any indicator designating the race or color of a particular registered voter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

OFFICES:
INCOMPATIBILITY:

In a fourth class city under the mayor-council form of government, so far as state law is concerned, the same individual may simultaneously hold the position of water, street, and sewer commissioner and the position of city clerk; the position of water, street, and sewer commissioner, and the position of city treasurer; and the position of water, street, and sewer commissioner, and the position of city collector, but that the holding of the positions of city clerk, city treasurer, and city collector, or of any two of these three offices, by the same persons at the same time would be incompatible.

June 10, 1955

Honorable J. Ellis Dodds
Representative
Pulaski County
Waynesville, Missouri



Dear Sir:

Your recent request for an official opinion reads as follows:

"I would like to have an official opinion as to whether in a city of the fourth class, which has the mayor-council form of government, it is proper for one individual to hold the following positions at the same time: Water, street and sewer commissioner; city clerk; city treasurer; city tax collector."

The legal principle applicable in the instant situation is one which is so clearly established in Missouri as not to require establishment by us here. It is, that in the absence of a statutory or constitutional prohibition, there is no limit to the number of offices which an individual may hold simultaneously, provided that there is no incompatibility between any of the offices so held.

"Incompatibility" has been defined, in the case of State ex rel. Walker, Attorney General, vs. Bus, 135 Mo. 327, l.c. 338, 36 S.W.636, as follows:

"* * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but

there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers as where one has some supervision of the other, is required to deal with, control, or assist him."

The term has been further defined as follows:

"* * * They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. * * *" 42 Am. Jur., Public Officers, Sec. 70.

With those principles in mind let us now examine the duties of the four city offices enumerated by you, from the viewpoint of their mutual compatibility, and of any statutes or constitutional provisions which may affect them.

The first office listed by you is "water, street, and sewer commissioner." Since writing your letter requesting an official opinion, you have verbally informed us that the above is an office created by the city council of your town; that the person handling it has general oversight of the waterworks, streets, and sewers, and makes more or less regular reports to the city council regarding them. How much actual authority this person has over the waterworks, streets, and sewers is not too clear, but it appears that he acts only in a supervisory or advisory capacity, and that his main job is purely administrative. It does not appear that he is authorized to expend, collect or handle city funds in this job. You have informed us that he is not one of the three "waterworks commissioners" provided for by Section 91.260, RSMo 1949.

The second position which is listed by you is, "city clerk." Applicable to that position in a fourth class city is Section 79.320, RSMo 1949, which reads:

"The board of alderman shall elect a clerk for such board, to be known as 'the city clerk,' whose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city."

What duties may have been placed upon the city clerk by the ordinances of your town we do not know, but so far as appears from the statute we do not see any incompatibility between the position of "water, street, and sewer commissioner" and "city clerk."

The third office listed by you is "city treasurer." Applicable to this position in a fourth class city is Section 79.300, RSMo 1949, which reads:

"The treasurer shall receive and safely keep all moneys, warrants, books, bonds and obligations entrusted to his care, and shall pay over all moneys, bonds or other obligations of the city on warrants or orders, duly drawn, passed or ordered by the board of aldermen, and signed by the mayor and attested by the city clerk, and having the seal of the city affixed thereto, and not otherwise; and shall perform such other duties as may be required of him by ordinance. Before entering upon the duties of his office he shall give bond in such sum as may be required by ordinance."

We see no incompatibility between the office of treasury and the position of "water, street, and sewer commissioner," but we do see incompatibility between the office of treasurer and the office of "city clerk."

Section 79.320, supra, states that the city clerk shall, among other duties "be the general accountant of the city." As general accountant it would be his routine duty to accept and

examine the report of the city treasurer, and, if mistakes or discrepancies were noted, to call upon the city treasurer for an explanation and clarification. As accountant, the city clerk would be required as a part of his duty to audit the books of the city treasurer if called upon by the city council to do so. If the same person held both offices he would be in the position of accepting from himself a report prepared by himself, of examining and approving it, and of auditing his own books if requested by the city council to do so.

We believe that the incompatibility involved in this situation is so evident as not to require further elaboration.

The fourth office listed by you is "city tax collector." Applicable to this position in a fourth class city is Section 95.360, RSMo 1949, which reads:

"It shall be the duty of the city collector to pay into the treasury, monthly, all moneys received by him from all sources which may be levied by law or ordinance; also, all licenses of every description authorized by law to be collected, and all moneys belonging to the city which may come into his hands. He shall give such bond and perform such duties as may be required of him by ordinance."

This office seems to be compatible with that of water, street, and sewer commissioner. We do not believe it to be compatible with that of city clerk, since the clerk would have the custody of the bond of the collector and the reports of the collector. No doubt he would have to attest both the bond and the reports.

Furthermore, here, as in the case of the city treasurer, the relationship between the office of the city clerk and city collector is very close. The city clerk charges the collector's books out to him, receives them back from the collector, receives the settlement of the collector, and in his capacity as general accountant of the city examines the books of the collector. Here also, if requested by the city council to do so, he would be required to audit the books of the collector. In this situation likewise the incompatibility is so evident as not to need elaboration.

We believe it to be clear that the office of the city collector is incompatible with that of city treasurer, since the same person in his capacity as collector, would pay to himself, in his capacity as treasurer, "all monies received by him from all sources," monthly. If the same person occupied both offices it seems obvious that the interests might be conflicting, and that the duties might easily be evaded.

We believe that, if it had been the intent of the Legislature that all of these offices be filled by the same person, they would have been so consolidated. We believe further that one reason for their separation was that individual office holders would provide a check and balance upon other office holders, thereby making more probable the honest and efficient discharge of the functions of government. It would seem to us therefore, that in your situation the same person could at the same time, be "water, street, and sewer commissioner" and "city clerk;" "water, street, and sewer commissioner" and "city treasurer;" "water, street, and sewer commissioner" and "city collector," but that the holding of the offices of city, city treasurer, and city collector, or of any two of them, by the same individual at the same time, would be incompatible.

As being illustrative of the matter involved in incompatibility, we enclose a copy of an opinion rendered by this department May 6, 1949, to Honorable William Barton, Representative of Montgomery County; also a copy of an opinion rendered July 1, 1948 to Honorable Lane Harlan, Prosecuting Attorney of Cooper⁴⁹ County, and also a copy of an opinion rendered January 20, 1939, to Honorable W. A. Despain, Prosecuting Attorney of Shannon County.

CONCLUSION

It is the opinion of this department that in a fourth class city under the mayor-council form of government, so far as state law is concerned, the same individual may simultaneously hold the position of water, street, and sewer commissioner and the position of city clerk; the position of water, street, and sewer commissioner, and the position of city treasurer; the position of water, street, and sewer commissioner, and the position city collector, but that the holding of the positions of city clerk, city treasurer, and city collector, or any two of these three offices, by the same person at the same time would be incompatible.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

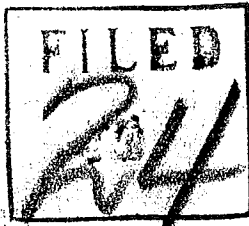
Enc:

PUBLIC SCHOOL RETIREMENT SYSTEM:

Definition of words "substitute" and "temporary" as used in House Bill

SCHOOLS:

No. 387, 68th General Assembly, relating to Public School Retirement System.



September 27, 1955

Mr. G. L. Donahoe
Executive Secretary
Public School Retirement System
Jefferson Building
Jefferson City, Missouri

Dear Mr. Donahoe:

This is in response to your request for opinion dated August 5, 1955, which reads as follows:

"House Bill #387, as passed by the 68th General Assembly, was approved by the Governor and will become effective August 29, 1955. This Bill contains only one section, which reads as follows:

'Section 1. Any retired teacher as defined in section 169.010 who is currently receiving a retirement allowance may serve as a substitute teacher not to exceed 60 days in any one school year; and the retirement allowance of such retired teacher shall not be reduced or discontinued because of such service nor shall such retired teacher contribute to the retirement system because of earnings during such period of temporary employment.'

"Section 169.010, as referred to in this Bill, contains a definition of 'teacher', which definition was for the purpose of determining eligibility for membership in the retirement system. We are not aware of any statutory definition of the term 'substitute teacher' and, since this Bill provides that a retired member of our system may serve as a substitute teacher not to exceed 60 days in

Mr. G. L. Donahoe

any school year without a reduction or discontinuance of the retirement allowance payments because of such service, we feel the need for some manner of determining when the retired member is serving as a substitute teacher as differentiated from services as a teacher on a full-time basis, or services on a part-time basis.

"The Board of Trustees would appreciate a definition of 'substitute teacher' under temporary employment as the terms are used in H. B. #387 in order that we may know the type of teaching service which may be rendered by a retired teacher as provided for in this Bill and without a reduction or discontinuance of the retired teacher's allowance."

In your request you have referred to Section 169.010, RSMo, Cum. Supp. 1953, which defines the word "teacher," in part, as follows:

"(6) 'Teacher' shall mean any * * * substitute teacher, * * * who shall teach or be employed by any public school, state college or state teachers' college on a full-time basis * * *."

We are informed that in many of the larger school systems there are regularly employed teachers who do not have a specific assignment but whose duty it is during the school year to substitute for absent teachers as directed by the administrative authority. In referring to a period of temporary employment in House Bill No. 387 it is obvious that it was not this type of employment that was intended to be exempted from the provisions of the Retirement System law.

The word "temporary" is defined as follows:

"Lasting for a time only; existing or continuing for a limited time; not permanent; ephemeral; transitory; as, temporary relief; a temporary position."

Webster's New International Dictionary,
Second Edition, Unabridged.

Mr. G. L. Donahoe

We further believe that the use of the word "temporary" excludes from the purview of House Bill No. 387 the regular employment of a substitute teacher on a part-time basis.

It is conceivable that a teacher may actually serve less than sixty days during a school year as a substitute but, nevertheless, be regularly employed so as to fall within the definition of a teacher under Section 169.010, supra, and not within the exemption of House Bill No. 387. In *Charters v. Board of Trustees of Seattle Teachers' Retirement Fund*, 192 Wash. 261, 73 P. (2d) 508, a teacher was employed as a regular substitute each year to be called upon by the superintendent as she might be needed to take the place of an absent teacher. The retirement law required that to be eligible for benefits the teacher must have been "regularly employed." The court said, 73 P. (2d) 1.c. 513:

"After careful consideration of the statute, we hold that a substitute teacher, occupying a status similar to that occupied by appellant here, is a teacher regularly employed within the purview of the section of the act defining the word 'teacher.' * * *"

We have been unable to find any legal definition of the term "substitute teacher" either in the Missouri statutes or Missouri cases. However, the word "substitute" does not have a common accepted dictionary meaning. In Webster's New International Dictionary, Second Edition, Unabridged, the word "substitute" is defined, in part, as follows:

"1. A person or thing put in place of another; one acting for, taking the place of, or held in readiness to replace, another.

* * * * *

"Syn. - Substitute, Deputy, Proxy. Substitute applies in general to one who takes another's place in case of the latter's absence. * * *"

We have searched the cases from other jurisdictions and find that the proper definition of the term "substitute teacher" has most often arisen in connection with a state's tenure law.

Mr. G. L. Donahoe

Usually the term is either defined by statute or the court's construction of it is founded upon a statute. However, the meaning given to the term is consistent throughout and conforms to the generally accepted meaning of the word "substitute."

For example, in *Schulz v. State Board of Education*, 132 N.J.L. 345, 40 A. (2d) 663, 669, the court stated:

"The word 'substitute' usually presents the idea of something or someone substituted for another - not the real thing or the real person, but a 'substitute.'"

In *Gerritt v. Fullerton Union High School Dist.*, 24 Cal. App. (2d) 482, 75 P. (2d) 627, 639, it was said:

"Permanent or probationary teachers are, under the school laws, employed for a year, while substitute teachers are employed from day to day. * * *"

Again, in *Wood v. Los Angeles City School Dist.*, 6 Cal. App. (2d) 400, 402, 44 P. (2d) 644, 645, the court said:

"The substitute teacher is employed from day to day to serve at the option of the school district in the absence of the regular teacher."

Therefore, we believe that a retired teacher to fall within the meaning of House Bill No. 387 may be employed temporarily, as opposed to regularly, as a substitute for a regularly employed teacher who for any one of many reasons may be absent, or to fill a position which may temporarily be vacant.

CONCLUSION

It is the opinion of this office that House Bill No. 387, 68th General Assembly, permits the temporary employment of a retired teacher to serve as a substitute for a regularly employed teacher not to exceed sixty days in any one school year, or to fill a position which may temporarily be vacant, such

Mr. G. L. Donahoe

teaching service being rendered in accordance with the definition of the words "substitute" and "temporary" as contained in the body of this opinion.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

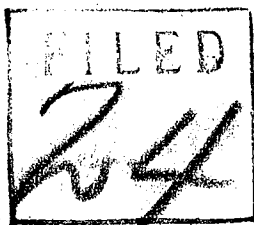
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

CORONERS:
INQUESTS:

When there is no coroner in a county, there is no means by which an inquest may be held.



December 9, 1955

Honorable J. Morgan Donelson
Prosecuting Attorney
Mercer County
Princeton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The coroner for Mercer County, Dr. C. P. Pickett, died some months ago after his election and qualification after the last regular election. The vacancy of this office was duly certified to the Governor but since that time no appointment has been made. I would like an official opinion from your office as to whether an inquest can be held under these circumstances when required? Whether the sheriff under the law requiring him to act in the temporary absence of the coroner is broad enough to permit said sheriff to act as coroner? If the sheriff cannot act and no appointment is made, who is permitted by law to perform the necessary duties required of a coroner?"

Section 58.205, RSMo, Cum. Supp. 1953, reads as follows:

"The sheriff of the proper county shall, in the temporary absence of the coroner for any reason, perform all the duties imposed by law upon the coroner."

It will be noted that the above holds that the sheriff may perform all of the duties of the coroner, which certainly would include the holding of inquests, "in the temporary absence of the coroner." It is clear that the above means to confer the power of a coroner on the sheriff when there is a coroner of the county in existence, which is not the situation here since the coroner, being dead, leaves the county wholly without a coroner.

Honorable J. Morgan Donelson

For the same reason, it cannot be said that the coroner is "temporarily absent," his absence being final and absolute.

In view of the above, we do not believe that the above statute can be made to apply in the situation which you set forth. Furthermore, we are unable to find the power of holding inquests conferred upon any other person in any county since the repeal of Section 58.450, RSMo 1949, which stated that if the coroner is unable to take the inquest, any magistrate or any judge of a circuit court of the proper county may take the inquest and perform all of the duties hereby enjoined on the coroner. This section was repealed by the laws of 1951.

CONCLUSION

It is the opinion of this department that when there is no coroner in a county, there is no means by which an inquest may be held.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:bi

TELEPHONE EXCHANGES:
INDUSTRIAL INSPECTION:

A telephone exchange is not subject to industrial inspection, but associated activities collateral to the operation of the telephone exchange are subject to industrial inspection if they come within the compass of paragraph 2 of Section 291.060 RSMo 1949.



September 8, 1955

Honorable L. L. Duncan
Director Division of Industrial Inspections
Department of Labor and Industrial Relations
Jefferson City, Missouri

Dear Sir:

Your request for an official opinion, dated June 29, 1955, reads as follows:

"The writer would like very much to have an opinion from your office concerning whether or not it is permissible for the Division of Industrial Inspection, Department of Labor and Industrial Relations, to inspect and collect a fee from telephone companies operating in this State, according to Section 291.060."

Subsequently we wrote to you asking you to make your request somewhat more explicit, and on August 12, 1955, you wrote to us as follows:

"With reference to your letter of August 11 concerning the above subject, the writer wishes this opinion to cover garages, warehouses, also buildings housing exchanges, or any other building owned or operated by a telephone company in which telephone employees are required to perform duties."

It is upon the basis of the above two letters that this opinion will be written. All statutory references, unless otherwise indicated, are to the RSMo 1949.

Paragraph 2 of Section 291.060 reads as follows:

"1. The director of the division of industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another.

Honorable L. L. Duncan

"2. It shall be the duty of the director, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bakeshops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the director shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating to said establishments or their inspection shall be enforced by the director."

It will be noted that the above enumerates those places which are to be inspected by your division. A place, to be subject to inspection, must come within one, at least, of the categories enumerated, or it must come within the classification of a manufacturing, mechanical and/or mercantile establishment and/or workshop.

We can begin by noting that, in and of itself, a "telephone company" is, primarily none of the things enumerated in the above paragraph of Section 291.060, for the simple reason that it is a "telephone company," or, to use a more exact term, a "telephone exchange," since the first term embraces the officers, the articles of incorporation, the charter, the franchise, et cetera, whereas, the second term is, more definitely, the physical property belonging to and operated by a "telephone company," which physical property alone could be the subject of industrial inspection. The second term, "telephone exchange," has thus been defined in the case of *Western Union Telegraph Company v. American Bell Telephone Company*, 105 Fed. 684, l.c. 696:

"A telephone exchange is an arrangement for putting up and maintaining wires, poles, and switch boards within a given area, with a central office, and the necessary operators to enable the individual hirers of telephones within that area to converse with each other."

On October 10, 1934, this department rendered an opinion construing what is now substantially paragraph 2 of Section 291.060, to Mary Edna Cruzen, Commissioner of Labor, Jefferson City, Missouri. In this opinion, on page 4 et seq., we stated:

Honorable L. L. Duncan

"It cannot be denied that the Legislature has failed in its specific enumeration to mention telephone companies. Therefore, applying the first rule of construction we must hold that the Legislature did not intend to include telephone companies, because the general words, 'all other manufacturing, mechanical and mercantile establishments and workshops,' must be construed in the light of the specific words and it cannot be said that telephone companies are similar enough to any of the words specified as to bring them within the statute. It must appear, therefore, that telephone companies are not included within the act under the first rule of construction since they are not specifically named and since telephone companies cannot fairly be said, even by the application of the principle of ejusdem generis, which is the technical name of the first rule, to come within the terms of the statute.

"Having disposed of the first rule of construction we must resort to the general words, 'all other manufacturing, mechanical and mercantile establishments and workshops,' and even assuming that they must be given their full meaning, unless it can be said that telephone companies are fairly within those general words, it must be held that telephone companies are not included even under the second rule of construction. We are of the opinion that telephone companies are not either manufacturing, mechanical or mercantile establishments within the general understanding of the meaning of those words. Mr. Yates seems to be of the opinion that they are mercantile establishments, but we are inclined to the view that mercantile establishments are those engaged in selling goods, wares and merchandise either at wholesale or retail. We understand that the substantial business of telephone companies is that of rendering service to their telephone subscribers. They are not engaged in selling goods, wares or merchandise either at wholesale or retail."

To the above-quoted portion of the Cruzen opinion, we subscribe, and hold that, since a "telephone exchange" is not specifically enumerated in paragraph 2 of Section 291.060, as being subject to industrial inspection, and since it does not come within the classification of a manufacturing, mechanical, and/or mercantile establishment and/or workshop, that a telephone exchange, as defined herein, is not subject to industrial inspection.

Honorable L. L. Duncan

It is, however, a matter of common knowledge, of which we may take the equivalent of judicial notice, that telephone exchanges vary greatly in many respects, and that the single term, "Telephone exchange," does not in all situations mean the same thing, thus making it difficult to speak of them in generalizations. For example, in hundreds of villages in this state the telephone exchange is housed in a single room of a dwelling house; it consists of the comparatively small amount of mechanical apparatus necessary to make the system function; and is never staffed by more than one operator at a time. At the other extreme are the huge telephone exchanges in the cities of Kansas City and St. Louis.

For the reasons given above, that portion of the exchange which is a "telephone exchange," according to the definition of "telephone exchange" given in the Western Union Telegraph Company v. American Bell Telephone Company case cited above, is not subject to industrial inspection. But these very large exchanges, because of their size, necessitate associated activities to carry on the work of the exchange. The St. Louis Exchange, for example, has, in a building separate from its exchange, a garage for its motor vehicles. This garage has a personnel of several permanent, full-time employees. A garage is one of the places listed in paragraph 2, Section 291.060, supra, as being subject to industrial inspection. Can we say that this particular garage, because it is owned and operated by a telephone company, deals only with telephone company motor vehicles, and is not "public," is exempt from industrial inspection? We do not see that paragraph 2 of Section 291.060, supra, gives us any basis for making such a distinction, and it is, therefore, our opinion that such a garage is subject to industrial inspection.

We are further informed that the St. Louis Exchange also has a warehouse, with several full-time employees. We believe, likewise, that since paragraph 2 of Section 291.060 lists a "warehouse," as being subject to industrial inspection, that a warehouse, under these circumstances, is subject to industrial inspection.

We are further informed that up until a few years ago the St. Louis Exchange operated a restaurant mainly for the benefit of its employees, but to which the general public had access. Such restaurant, would, we believe, have been subject to industrial inspection for the reasons given above. The St. Louis Exchange, we are informed, is housed in a large building owned by the Southwestern Bell Telephone Company; which has many offices in which auditors, bookkeepers, clerks, stenographers, and executives are engaged in the business of running the business of the telephone company. Whether all of this building is occupied by telephone company employees, or whether part of it is leased to other businesses or to individuals we do not know, but in either case it could well be that this building would be properly classified as "an office building," as that term is used in paragraph 2 of Section 291.060. On this point we direct attention to the following excerpt from Prichard v. National Protective Insurance Company, 200 S.W. 540. At l.c. 544, the court stated:

Honorable L. L. Duncan

"The term 'office building' as used in the policy under consideration is not defined or limited in any manner. There is no adjudication by a Missouri court, or by any other court, called to our attention that defines the term 'office building.' According to the common parlance of the street, we are 'on the loose' and are at liberty to formulate our own definition of the term if we should deem it advisable to do so. The difficulties attendant upon such an effort are obvious and we do not consider a definition practicable for application to all cases because of the divergent facts that might appear in any given case. Nor is there any need for definition because any one using such term can readily supply his own definition by specifically indicating the sense which it is intended to have. We are of opinion that where such a term is used, as in the present case, without qualification, its meaning and application are subject to any fair and reasonable interpretation consistent with the language used and with the facts and circumstances surrounding the parties at the time of the execution of the policy and at the time of the casualty. Under the facts of record, we hold that the Insurance Company is not entitled to any restricted meaning of the term 'office building' in the absence of any express limitation or exception, but that said term is one subject to latitude in meaning and that the court is entitled to accord to it a liberal construction in favor of the insured.* * *"

From all of the above we come to the conclusion, as stated, that a "telephone exchange," as defined above, is not subject to industrial inspection for the reasons given above, but that any associated activity collateral to the operation of the telephone exchange is subject to industrial inspection if it comes within the compass of paragraph 2 of Section 291.060. Examples of such activities, as we pointed out above, are the operation of garages, warehouses, restaurants, office buildings, et cetera.

The entire purpose of industrial inspection is to see that a place necessarily frequented by employees, and to which the public is invited or permitted to come, is made as safe as possible. Such being true, any distinction made between two identical operations simply upon the basis that one of them was operated by a telephone company, would be artificial and arbitrary, and would defeat the entire purpose of the industrial inspection law. For example, elevator operators at 1010 Pine Street, St. Louis, telephone employees who must of necessity use these elevators, and members of the general public who are forced to use these elevators in pursuit of their business, are as much entitled to the protection in elevator service which

Honorable L. L. Duncan

is afforded by industrial inspection as are elevator operators, employees, and members of the general public in any other place or situation.

CONCLUSION

It is the opinion of this department that a telephone exchange is not subject to industrial inspection, but that associated activities collateral to the operation of the telephone exchange are subject to industrial inspection, if they come within the compass of paragraph 2 of Section 291.060 RSMo 1949.

The foregoing opinion, which I hereby approve was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General

MOTOR VEHICLES: Reciprocity in regard to vehicles hauling for
RECIPROCITY: hire exists between the State of Missouri and
the State of Florida in interstate movements.



January 14, 1955

Honorable Irvin D. Emerson
Assistant Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

This office is in receipt of an opinion request which is
quoted in part for brevity as follows:

"* * * * *

"The question is specifically is whether
under reciprocity between the two above
mentioned states can a person from Florida
operating on a Florida license haul inter-
state into Missouri and pick up a load in
Missouri to be delivered at Little Rock,
Arkansas?

"* * * * *

In our opinion, if reciprocity or comity exists between
the State of Missouri and the State of Florida, it must be in
accordance with Section 301.270, RSMo 1949, which is as follows:

"A nonresident owner, except as otherwise
herein provided, owning any motor vehicle
which has been duly registered for the
current year in the state, country or
other place of which the owner is a resi-
dent and which at all times when operated
in the state has displayed upon it the
number plate or plates issued for such
vehicle in the place of residence of such
owner may operate or permit the operation
of such vehicle within this state without
registering such vehicle or paying any
fee to this state, provided that the

Honorable Irvin D. Emerson

provisions of this section shall be operative as to a vehicle owned by a non-resident of this state only to the extent that under the laws of the state, country or other place of residence of such non-resident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The State of Florida has reciprocity statutes. They are found in Chapter 320, Sections 320.37 to 320.39 of the Revised Statutes of Florida of 1953. These statutes, while permitting reciprocity to ordinary pleasure motor vehicles, do not apply, as our above reciprocity section applies, to motor vehicles hauling for hire. In fact, the final sentence of the general reciprocity section, Section 320.37 of the Laws of Florida 1953, is as follows:

"* * *; but such exemption shall not apply to motor vehicles operated for hire."

In a special reciprocity section in regard to motor vehicles operating for hire in the State of Florida, under the terms of Section 320.39 mentioned above, the Motor Vehicle Commissioner, the State Road Department and the Railroad Commission are permitted to negotiate and consummate with the proper authorities of the several states of the United States reciprocity agreements whereby residents of such other states operating motor vehicles properly licensed and registered in their respective states may have such privileges and exemptions in Florida as the state of their residence allows to motor vehicles duly licensed and registered in Florida in the operation of motor vehicles in such other states. Such an agreement does not become effective until it has been approved by the Governor of the State of Florida.

For the purposes of this opinion, it must be said here that we do not find that any official of the State of Missouri has been empowered to negotiate any agreement or agreements under the provisions of the above section of the statutes; on the contrary, the right of reciprocity with respect to the regular license fees imposed on motor vehicles must be determined by reference to the statutory law of the foreign state under consideration.

The State of Florida now enforces its motor vehicle registration law in regard to motor vehicles hauling for hire in accordance with an agreement entered into by its commission

Honorable Irvin D. Emerson

mentioned above, and Honorable Morris Osburn, Chairman of the Missouri Public Service Commission in 1947, and Honorable Hinkle Statler, then Commissioner of Motor Vehicles. This agreement was signed by the person in Florida required by statute to sign such an agreement. Although it has been said that no such authority existed in our State, the document dated March 1, 1947, is in existence today and is given full force and effect as to nonresidence of Missouri in Florida by that State. It must be concluded then that under the laws of Florida, in accordance with the reciprocity agreement mentioned, the provisions as follows are in effect:

"1. Motor vehicles which are owned, properly licensed and otherwise taxed and operated by bonafide residents of either Florida or Missouri shall be allowed to operate in both states while engaged exclusively in interstate commerce transporting goods, wares or merchandise including horticultural, agricultural products and logs, lumber or other forest products, fish, oysters, shrimp and dairy products and live-stock.

"2. Motor vehicles which are owned, properly licensed and otherwise taxed and operated by bonafide residents of either Florida or Missouri shall be allowed to operate in both states while engaged exclusively in interstate commerce transporting passengers for compensation."

The provisions of Section 301.270, RSMo 1949, operating to the same extent to a vehicle owned by a resident of Florida as the laws of Florida operate as to a vehicle owned by a resident of Missouri, are binding on Missouri when recognized and treated in Florida under the law of Florida.

CONCLUSION

In the premises, it is the opinion of this office that a person from Florida operating on a Florida license may haul interstate into Missouri from Arkansas, or into Arkansas from Missouri, without first registering his vehicle in Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Yours very truly,

JWF:ma:da

JOHN M. DALTON
Attorney General

OFFICERS: Violation of nepotism provision by appointing authority does not authorize removal of public officer appointed; appointment of more persons from one political party to county highway commission than statute authorizes does not disqualify the person from county highway commission.



April 27, 1955

Honorable Loyd J. Estep
House of Representatives
Capitol Building
Jefferson City, Missouri

Dear Mr. Estep:

We have received your request for an opinion of this office, which request reads as follows:

"How can the County Court dismiss a public officer such as a County Highway Commissioner which has been appointed by a previous County Court in violation of the constitution regarding nepotism?

"Further, if on the highway commission consisting of four members chosen bipartisan, there happens to be three members known to affiliate with one political party, how may this inequality be changed?

"Particularly, we would like to know whether or not this would require action by a court of record."

Section 230.020, RSMo 1949, provides:

"Within sixty days after the taking effect of this chapter, it shall be the duty of the county court in all counties of this state, except as otherwise in this chapter provided, to appoint four members of the county highway commission, one for a term of one year; one for a term of two years; one for a term of three years; and one for a term of four years. Upon expiration of the term of each of said commissioners his successor shall be appointed for a term of four years, and every such commissioner

Honorable Loyd J. Estep

shall hold office for the term appointed and thereafter until his successor is appointed and qualified. Not more than two of said commissioners shall be appointed from the same county court district, and not more than two thereof shall be affiliated with the same political party. No person shall be eligible to appointment as a member of the county highway commission who shall not have attained the age of twenty-five years, and who at time of his appointment is not a bona fide resident of county wherein appointed, and possessed of a knowledge of the interest of said county, and a known supporter and advocate of a system of county highways, constructed and maintained with a view to affording the greatest convenience to the greatest number of inhabitants of the county in the matter of farm-to-market roads. Within ten days after their appointment the members of such county highway commission shall meet at the county seats and organize by the election of one of their number as president, and another as secretary, of said commission."

Section 6, Article VII of the Constitution of Missouri, 1945, provides:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

There is no constitutional or statutory provision regarding the effect of relationship to the appointing authority within the constitutional limitation upon the person appointed to office.

The office of county highway commissioner is a public office. State ex rel. Flowers v. Morehead, 256 Mo. 683.

Section 4 of Article VII, Constitution of Missouri, 1945, provides:

"Except as provided in this Constitution, all officers not subject to impeachment

Honorable Loyd J. Estep

shall be subject to removal from office in the manner and for the causes provided by law."

There is nothing in Chapter 230, RSMo 1949, which authorizes a county court to remove a member of the county highway commission for any cause whatsoever. In the case of State ex rel. Flowers v. Morehead, supra, the Supreme Court discussed the question of removal of a member of the county highway board, the predecessor to the county highway commission. In that case the court stated:

"Under the express statute, therefore, creating the position of a member of the highway board and in the light of the reasons stated in the cases above cited, an appointee to this position, upon qualifying, becomes a public officer, the act of his creation not only stating his term but definitely defining his duties. (Secs. 4 to 9, both inclusive, Laws 1913, p. 666.) It must be borne in mind in determining the character of this position, that it is the functions the appointee is required to perform, that determines the character of his office, and it is not material to this characterization that no salary or fees are annexed thereto, and that the position is merely honorary and exists only for the public good. (Clark v. Stanley, 66 N.C. 59, 67; Throop on Public Officers, sec. 3, p. 4.) It is provided in the Constitution (Art. 14, sec. 7, Constitution) that 'the General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers, on conviction of wilful, corrupt or fraudulent violation or neglect of official duty;' in construing this section this court has held that the Legislature is not limited in enacting statutes of removals to the acts specified in the Constitution, but it may make such reasonable and proper provisions regulating same as may seem just. (State v. Boyd, 196 Mo. 1.c. 59, 66; State ex rel. v. Sheppard, 192 Mo. 497, 506; Manker v. Faulhaber, 94 Mo. 430, 438.)

Honorable Loyd J. Estep

"No particular statutory method has been provided, however, for the removal of members of county highway boards, and a reference to the general statute in regard to the removal of county, town and township officers (Sec. 10204 et seq., R.S. 1909) is necessary to determine where the authority lies and what facts will sustain such a proceeding. Without literally quoting the general statute it will suffice to say that while broader than the constitutional provision (Sec. 7, Art. 14, supra) it limits the causes of removal to dereliction of or willful refusal to perform official duty, and requires the proceedings to be commenced and heard in the circuit court.

"In the absence, therefore, of particular statutes, the methods prescribed and the reasons assigned in section 10204 et seq., supra, are the limits of authority for the removal of members of any of the classes of officers therein specified. Members of county highway boards being public officers are properly designated as one of such statutory classes, and, therefore, subject to the provisions of the general statute in regard to removal. Their terms are definitely defined by law, and their duties are all of a public nature, and, while the statute is silent in regard to the subject, their removal will not be justified unless in each instance notice of proceedings therefor is given them, and they are afforded an opportunity to be heard in their own behalf (State ex rel. v. Maroney, 191 Mo. 531); or, in other words, as elaborately and learnedly discussed in State ex rel. v. Sheppard, 192 Mo. 497, they cannot be deprived of their offices without resort to the forms of the law.

"There is no pretense that the relator was removed for other cause than that the county court deemed his appointment unauthorized in the first instance on the theory that the court's power of appointment was limited to two members who with the highway engineer would constitute said board. Relator's removal, therefore, under the circumstances, was without statutory sanction, and unauthorized."

Honorable Loyd J. Estep

Section 106.220, RSMo 1949, provides:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner provided in sections 106.230 to 106.290."

Relationship to the appointing authority would not be grounds for ouster of the person appointed under this statute.

"The incumbent of an office should not be deprived of it except in accordance with the law of the land. If the organic law of the government entity is silent as to the mode of procedure, or the legislature makes no provision for the manner of removal, the officer must be deposed, as provided for by the fundamental law; and the substantial principles of the common law as to proceedings affecting private rights must be observed." 67 C.J.S., Officers, Section 59, page 241.

Relationship by affinity or consanguinity is not a disqualification in the absence of constitutional or statutory provision making it such. *Rupert v. VanBuren County*, 296 Mich. 240, 295 N.W. 630; 60 C.J.S., Officers, Section 22, page 133. In the absence of any provision making such relation the basis for disqualification of the person appointed to office, it appears that there would be no grounds in this state for removal from public office of one appointed by an official who violated the anti-nepotism provision of the Constitution. Section 6, Article VII of the Constitution, *supra*, imposes punishment for its violation only upon the appointing authority, and absent statutory disqualification of a person appointed by reason of such relationship, we are of the opinion that such relationship does not afford the proper basis for the removal from office of the person appointed.

Honorable Loyd J. Estep

As for your second question, Section 230.020, RSMo 1949, above quoted, provides, in part:

"Not more than two of said commissioners shall be appointed from the same county court district, and not more than two thereof shall be affiliated with the same political party."

In view of the decision in the case of State ex rel. Flowers v. Morehead, supra, there would appear to be no basis for the removal of the member of the county highway commission because his appointment results in more than two members of the same political party being members of the commission.

Furthermore, cases dealing with statutes such as this throw doubt on the question of whether or not the provision requiring that not more than a certain number of members of a board or commission belong to the same political party actually imposes a qualification upon the person appointed. In the case of Harrell v. Sullivan, 220 Ind. 108, 40 N.E. (2d) 115, 140 A.L.R. 455, 1.c. 457, the court stated:

" * * * A statute which provides for a board or commission of a certain number, no more than a certain proportion of whose members shall belong to the same political party, imposes a limitation and not a qualification. * * *"

See also State ex rel. Simeral v. Seavey, 22 Neb. 454, 35 N.W. 228.

Our research has not revealed one case in which an officer was held subject to removal because the appointing authority disregarded a statutory provision relative to the number of persons who might be appointed to a board or commission from one political party. In the absence of any such authority, we are unable to say that such fact alone would be a proper basis for the removal of such person from office.

CONCLUSION

Therefore, it is the opinion of this office that:

1. In the absence of constitutional or statutory provisions disqualifying a person who has been appointed to public office

Honorable Loyd J. Estep

by an official who violated the anti-nepotism prohibition of the Constitution, we are of the opinion that relationship within the prohibited degree is not grounds for removal from office of the person appointed;

2. The appointment of a person to the county highway commission which results in that body's having three members of the same political party does not afford any basis for the removal from office of the person so appointed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

COUNTIES: Mandamus will lie against a county to compel
MUNICIPAL CORPORATIONS: issuance of warrants in order to satisfy
TAXATION: judgment obtained against county for tax bills
CITIES, TOWNS for street improvements issued by city of
AND VILLAGES: fourth class if there is sufficient money in
general fund of the county available to pay
same. If not sufficient money in general
fund, mandamus will lie to require levy within
constitutional limits to provide funds for
payment of judgment. Immaterial that county
has not included payment of such tax bills in
its budget.



February 28, 1955

Honorable C. B. Fitzgerald
Prosecuting Attorney
Putnam County
Unionville, Missouri

Dear Mr. Fitzgerald:

This is in response to your request for an opinion dated
February 2, 1955, which reads as follows:

"I would greatly appreciate an opinion from
your office regarding the following matter:

"Facts:

"A Missouri city, of the fourth class, by
and through its mayor and board of alder-
men, pass an ordinance providing for the
construction of certain paving and curbing
on and abutting certain of its streets
including the area around the city square,
under the authority of VAMS 1949, Secs.
88.700, 88.703, 88.693 and related stat-
utes. The ordinance is in proper form,
and the city fully complies with all the
requirements of the statute regarding
publication of declaration of necessity,
notification of County Clerk and other
formalities, and contracts for such work
to be done. The work is properly done,
and careful accounts are kept of the labor
and material expended, after which the
City issues tax bills against abutting
and benefited property.

"In the center of the city square around
which certain paving and curbing was con-
structed is a tract of land upon which is
located the County Courthouse, all belonging
to the County. The city issues tax bills
against this land on account of said paving
and curbing on all four sides of the square.

Honorable C. B. Fitzgerald

"Issues Upon Which An Opinion Is Requested:

"1. Under the provisions of 88.703 and 88.750, VAMS 1949, if the County does not pay such tax bills, and the City obtains a general judgment against the County for same, will mandamus thereafter lie against the County Court to compel it to issue warrants in payment thereof:

(a) If there is sufficient money in the general fund of the County to pay same.

(b) If there is not sufficient money in the general fund of the County with which to pay same and it is certain that the warrants, if issued, will be protested.

"2. Is it material if that portion of the paving and curbing for which the County is liable has never been included as an item of expense in the County budget."

The foundation of your inquiry is Section 88.703, RSMo 1949, which because of its length we shall not quote in full, but for sake of convenience shall set out the pertinent portion thereof:

" * * * and each lot or piece of ground abutting on such sidewalk, street, avenue, or alley, or part thereof, shall be liable for its part of the cost of any work or improvement provided for in this section, done or made along or in front of such lot or piece of ground as reported to the board of aldermen, and all lands, lots and public parks owned by any county or city, and all other public lands, all cemeteries, owned by public, private or municipal corporations; provided, that nothing in this section shall be construed to authorize any assessment against any cemetery lot, and all railroad right of ways fronting or abutting on any of said improvements, shall be liable for their

Honorable C. B. Fitzgerald

proportionate part of the cost of such work and improvements, and tax bills shall be issued against said property as against other property, and any county or city that shall own any such property, shall out of the general revenue funds pay any such tax bill, and in any case where any county or city or railroad company shall fail to pay any such tax bill, the owner of the same may sue such county, city or railroad company on such tax bill and be entitled to recover a general judgment against such county, city or railroad company. * * *

As background for the answers to your questions, we direct attention first to the case of City of Clinton to Use of Thornton v. Henry County, 115 Mo. 557, 22 S.W. 494. That case involved tax bills issued by the city of Clinton for the improvement of streets abutting the courthouse square. Suit was brought in the name of the city to the use of the contractors seeking a general judgment against the county. The court held that "As public property like that here in question cannot be sold on general or special execution, and as the legislature has provided no other remedy than that of enforcement of the lien, it is quite evident that the statute in question does not apply to or include property owned by a county and used for governmental purposes." (Mo. l.c. 570.)

The court recognized, however, that it was within the province of the Legislature to make this property subject to local assessment for public improvement. At Mo. l.c. 570, the court said:

"It is true the cases last cited were all suits against private property owners; and as it is within the power of the legislature to make property devoted to public uses liable for local assessments, and as it is contrary to public policy to permit public property to be sold, we may and do concede that the legislature can provide for the payment of local assessments against public property out of the general treasury. Such a provision would doubtless be sufficient to show an intent to make such property liable for these assessments; but the legislature has made no such provision. The

Honorable C. B. Fitzgerald

argument, therefore, that the courts can devise a remedy where there is a right does not meet the issue in this case; for the real question is, whether the city had the power or right to levy the assessments upon public property, and we are unable to find any evidence of such a legislative intent.

" * ** The property here in question is strictly public property, and on well settled principles of law cannot be held liable for these local improvement assessments until the legislature so says in clear terms or by necessary implication, and that it has not done by the statute relating to cities of the third class."

This case was decided in 1893. In 1923 the Legislature amended Section 88.703, supra, adding the provision applicable to counties, railroads, cemeteries, etc. (Laws of Missouri, 1923, page 264), which made the statute read as it does today.

In the next year, 1924, the Supreme Court decided the case of City of Edina to Use of Pioneer Trust Co. v. School District of City of Edina and Knox County, 305 Mo. 452, 267 S.W. 112, 36 A.L.R. 1532. The court held that a general judgment could be obtained against a county for special tax bills issued by a city of the fourth class for the improvement of streets. The basis of this decision was not Section 88.703, supra, as it had been amended in 1923, but rather Sections 8526, 8527 and 8528, R.S. Mo. 1919 (Secs. 88.743, 88.747, 88.750, RSMo 1949), which latter sections had been enacted by the Legislature in 1901.

In any event, the Legislature has made it clear, and the court has held, that the real estate of a county in cities of the fourth class is subject to special tax bills for improving streets and that if it does not pay same a general judgment can be obtained therefor. See also Harrison and Mercer County Drainage District v. Trail Creek Township, 317 Mo. 933, 297 S.W. 1.

Having established that a general judgment can be obtained against the county for such special tax bills, but that it cannot be collected by special or general execution against the property itself, the question remains as to how the judgment may be enforced. It has been definitely decided in many cases

Honorable C. B. Fitzgerald

that mandamus is the proper remedy to enforce payment of a general judgment against a public corporation. For instance, in *State ex rel. Hentschel v. Cook*, Mo. App., 201 S.W. 361, 364, the Springfield Court of Appeals said:

"It is declared in 26 Cyc. 307, that mandamus is usually regarded as a proper remedy to enforce a judgment against a municipal or public corporation, and it has been generally used for such purpose in this state as every lawyer knows. When so used it is regarded as a mere ancillary proceeding to the main suit; when so employed the writ is not a new suit but simply process essential to jurisdiction - it is a means of enforcing collection of a judgment against a municipal corporation, the legal equivalent of an execution upon a judgment against an individual. *Lafayette County v. Wonderly*, 92 Fed. 313, 34 C.C.A. 360; *Thompson v. Ferris Irr. Dist. (C.C.)* 116 Fed. 769; *Howard v. Huron*, 5 S.D. 539, 59 N.W. 833, 26 L.R.A. 493, 500; *Kinney v. Eastern Trust & Banking Co.*, 123 Fed. loc. cit. 300, 59 C.C.A. 586; *United States ex rel. Masslich v. Saunders*, 124 Fed. 124, 59 C.C.A. 394; *Carter County v. Schmalstig*, 127 Fed. 126, 62 C.C.A. 78. * * *

See also *State ex rel. Hufft v. Knight*, Mo. App., 121 S.W. (2d) 762; *Security State Bank v. Dent County*, 345 Mo. 1050, 137 S.W. (2d) 960; and *Burgess v. Kansas City*, Mo. App., 259 S.W. (2d) 702.

Therefore, the answer to your first question is that mandamus will lie against the county to compel it to issue warrants in payment of the tax bills for street improvements issued by a city of the fourth class if there is sufficient money in the general fund of the county available to pay same.

If there is not sufficient money in the general fund of the county to pay the judgment, mandamus will lie to require the extension of a sufficient levy within the constitutional limits to provide funds for the payment of the judgment. We believe the reasoning in the case of *State ex rel. Hufft v. Knight*, supra, equally applicable in the case of counties, where the court said, 121 S.W. (2d) 1.c. 764:

" * * * Since an execution may not be run against the property of a school district or other political sub-division of the State (State, to Use of Board of Education, v. Tiedemann, 69 Mo. 306, 33 Am. Rep. 498; City of Edina v. School District, 305 Mo. 452, 267 S.W. 112, 36 A.L.R. 1532; Sec. 1161, R.S. Mo. 1929, Mo. St. Ann. Sec. 1161, p. 1424) the only other procedure available to a judgment creditor to enable him to collect his judgment is for a court of competent jurisdiction to issue its writ of mandamus, requiring the extension of a sufficient levy within the constitutional limits, to provide funds for the payment of the judgment. State ex rel. Hentschel v. Cook, supra; State ex rel. Edwards v. Wilcox, supra.

"Mandamus, of course, cannot be employed to control the discretion of one authorized to determine the levy necessary to provide funds necessary for a district. Yet, a school district owes the duty to pay an obligation established by a judgment against it, and its officers are required to take such steps as the Constitution authorizes for the immediate discharge of the liability fixed by the judgment. Its duty to do so results from the plain moral as well as the legal obligation of a municipality or district to pay its debts and no discretion within the legal limitation of the performance of the duty can rightfully be claimed or exercised. However, a court cannot by mandamus proceedings compel a municipal sub-division of the state to levy a tax in excess of the maximum fixed by the Constitution. Bushnell et al. v. Drainage District, Mo. App., 111 S.W. 2d 946. The duty of a school district to discharge its obligations, if it can do so by a levy within the limits provided by law, is mandatory upon the district and its directors, and it is mandatory that they certify a levy within the legal limits, sufficient to retire the obligations of the district and mandamus does not interfere with any discretionary powers entrusted

Honorable C. B. Fitzgerald

to the directors. State ex rel. R. E. Funsten Co. v. Becker et al., Judges of St. Louis Court of Appeals, 318 Mo. 516, 1 S.W. 2d 103; State ex rel. Kirkwood School District v. Herpel, Mo. App., 32 S.W. 2d 96."

We do not consider it material that the portion of the paving and curbing for which the county is liable has never been included as an item of expense in the county budget. In the case of Barber Asphalt Paving Co. v. St. Joseph, 183 Mo. 451, 459, 82 S.W. 64, the contention was made that, since no definite amount of money was first appropriated for the liquidation of the cost of paving the street prior to the letting of the contract, the tax bills were void. However, the court said:

" * * * This contention is no more tenable than the preceding one. The limitations of section 5557 have no more to do with the provisions of section 5682 than have the constitutional provisions referred to in the preceding paragraph.

"Under the provisions of section 5682 the general revenue fund of the city may be charged for the benefits which the property of the city has received by a public improvement, not because of any liability therefor created by any contract or act of its officers, but because its property has been benefited, and the property itself can not be charged for such benefit. The remedy provided by this statute is not for a liability under a contract, or which could be created by the act of its officers, but for the value of benefits to the city's property for which in equity and good conscience it ought to pay, although it could not be made liable therefor by any contract and the same could not be charged against its property."

CONCLUSION

It is the opinion of this office that mandamus will lie against a county to compel it to issue warrants in payment of a general judgment obtained against it as the result of special

Honorable C. B. Fitzgerald

tax bills for street improvements issued by a city of the fourth class if there is sufficient money in the general fund of the county available to pay same.

If there is not sufficient money in the general fund of the county in order to pay the judgment, mandamus will lie to require the extension of a sufficient levy within the constitutional limits to provide funds for the payment of the judgment.

It is the further opinion of this office that it is no defense to the county and immaterial that it has not included the payment of such tax bills in its budget.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

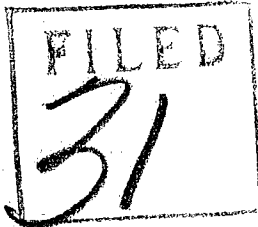
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

**PRELIMINARY EXAMINATIONS:
MAGISTRATES:**

The magistrate judge of Benton County is not precluded from holding a preliminary examination, based upon affidavits for state warrants filed in the magistrate court of Benton County, by the fact that previously identical affidavits for state warrants were filed in the magistrate court of Benton County, and that upon a preliminary examination held thereon, same defendant was ordered discharged.



January 13, 1955

Honorable Vernon Frieze
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"May I ask your opinion as to the Jurisdiction of Joe Berry, Magistrate, Benton County, Missouri, to hold three Preliminary Hearings against Frank Jessie Knox, under the following facts, to-wit:

"Approximately at 7 o'clock, P.M., October 9, 1954, Emill Salley and Eathel Logsdon were walking along Highway 35 from U.S. Highway 65 (Gateway Cafe) to Warsaw, Benton County, Missouri. An automobile operated along said highway in the same direction ran into and against said Emill Salley and Eathel Logsdon, instantly killing said Emill Salley and breaking the femur of Eathel Logsdon's left leg. The driver of said automobile did not stop the automobile but continued along said highway about 100 yards and turned the automobile around and drove back past the scene of collision but did not stop. There was a rumor that Frank Jessie Knox was the driver of said automobile. On the 10th day of October 1954, said Frank Jessie Knox surrendered to the sheriff of Benton County, Missouri, and on the same day an Affidavit for a State Warrant was filed in said Magistrate Court charging said Frank Jessie Knox with 'Manslaughter', and on the 15th day of

Honorable Vernon Frieze

October, 1954, two affidavits for State Warrants was filed in said Magistrate Court, one charging said Frank Jessie Knox with 'Leaving the Scene of an Accident' the other, 'Negligent Wounding with an Automobile'

"On October 26, 1954, Motion to disqualify Joe Berry, Magistrate, was filed in said court. E. R. Crouch, Magistrate of Hickory County, Missouri was called by Magistrate Joe Berry to hold said preliminary hearing of said charges, which hearing was had on December 11, 1954. The following entry was made in each case, to-wit:

"Defendant waives formal arraignment and pleads not guilty. Defendant ordered discharged'.

"On December 29, 1954, identical affidavits for State Warrants were filed in the Magistrate Court of Benton County, Missouri."

Your problem, stated briefly, is: One Knox was charged in the Magistrate Court of Benton County with the commission of a felony; he was given a preliminary examination, and at its conclusion was discharged; may exactly the same charges, based upon exactly the same evidence, be brought against him again and he be put through a second preliminary examination?

In the above, since you did not state the contrary, we have assumed that there is no newly discovered evidence. We have also assumed that the fact that the first preliminary examination was held before a magistrate from an adjoining county, and that the one next proposed will be held before the magistrate of Benton County, does not affect the issue as above stated. The law provides that prior to a preliminary examination, a motion may be filed to disqualify a magistrate, and that a magistrate from an adjoining county may be called by the first magistrate to conduct the preliminary examination, as was done in your case. We advert, then, to your original inquiry as to whether a second preliminary examination can lawfully be held under the circumstances forth above.

gely, it would seem, Missouri law is silent upon the a discharge at a preliminary examination. Section

Honorable Vernon Frieze

544.410, RSMo. 1949, merely states:

"If upon the examination of the whole matter, it appear to the magistrate either that no offense has been committed by any person, or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner."

Supreme Court Rule 23.08 states, in part: "If upon examination of the whole matter the magistrate shall determine that no felony has been committed by any person, or that there is no probable cause for charging the accused therewith, he shall discharge such accused." We must, therefore, look abroad for guidance in this matter, and in that regard we direct attention to Section 347, p. 507, Vol. 22 C. J. S., which reads:

"After the preliminary examination has begun, accused has a right to require that it shall be continued to a final determination, and that he shall be either discharged or held. The statutes are mandatory in this respect, except that, under some statutes, the examining magistrate is without authority to discharge one charged with a capital offense. It is the duty of the magistrate before whom a preliminary examination is being held, after an examination of the whole matter, to come to a determination as to whether or not an offense has been committed, and if he is of opinion that there has been, then as to whether there is probable cause to believe accused guilty thereof. If, on such examination, it appears that no offense has been committed, or that there is not probable cause for believing the prisoner guilty, it is the duty of the magistrate to discharge him, as where it affirmatively appears from the evidence, that if a trial were duly had the trial judge would be compelled to direct a verdict of acquittal as a matter of law.

"Unless otherwise provided by statute, the discharge of accused by the examining magistrate on the preliminary hearing neither annuls the indictment nor blots out the offense, and is no bar to another examination

Honorable Vernon Frieze

or to a subsequent prosecution for the same offense, and the fact that the examining magistrate dismisses certain counts of the complaint does not preclude the trial court from trying him on such counts. A fortiori is this true where defendant is discharged on the first arrest without any evidence being produced or offered. By statute, however, it may be provided that, after discharge on preliminary examination, no further prosecution of the offense shall be had."

It will be noted that the above states that discharge at a preliminary examination "is no bar to another examination," unless there is a statute which so states. We here note that there is no statute in Missouri which prohibits a second preliminary examination after discharge from a prior preliminary examination, provided that following the first preliminary examination new charges have been filed. Neither do we feel that such second preliminary examination would be prohibited on the ground that it constitutes "double jeopardy." In order to so hold, we would have to first find that a preliminary examination constituted "jeopardy." We do not believe that it does. On this point we direct attention to Section 251, p. 387, Vol. 22, C. J. S., which states in part:

"Jeopardy does not attach where the question submitted for the consideration of the court or jury is one which is merely preliminary or collateral to the trial of the question of the guilt or the innocence of accused. * * "

In the case of State v. McCombs, 188 P. (2d) 922, at 1. c. 924, the Supreme Court of Kansas stated:

"That appellant was within its rights in seeking another preliminary examination before a judge of the district court cannot be denied. Under our statute a judge of the district court is a magistrate authorized to conduct such an examination, G. S. 1935, 62-201, 62-601. We have expressly so held. Hancock v. Nye, 118 Kan. 384, 388, 234 P. 945. Moreover, it is settled law in this jurisdiction that the discharge on a preliminary hearing of a person charged with a felony is no bar to a subsequent preliminary hearing on another complaint charging the

Honorable Vernon Frieze

same offense. State v. Townsend, 150 Kan. 496, 95 P. 2d 328; State v. Badders, 141 Kan. 683, 685, 42 P. 2d 943; State v. Curtis, 108 Kan. 537, 196 P. 445; State v. Jones, 16 Kan. 608."

In the case of Ridenour v. State, 231 P. 2d, 395, at 1. c. 399, the Criminal Court of Appeals of Oklahoma stated:

"It is, however, evident from the record that the defendant herein was accorded a preliminary examination before a committing magistrate on a complaint duly filed by the county attorney with such committing magistrate, who was not by the defendant claimed to be disqualified to act. A similar complaint had been filed in the County Court covering the identical charge, and that court attempted to transfer the case so filed before him to the magistrate who actually held the preliminary examination. This appears to be of no consequence, in that the county attorney, independent of the action of the county judge acting as a committing magistrate, had the right and authority to file a complaint covering the charge with any other examining magistrate of his county whom he might choose. And for such reason it is not necessary to determine whether the county court of Muskogee County did or did not have authority to transfer the case for preliminary hearing to the City Court. One examining magistrate is not found by the action of another examining magistrate. In fact, one examining magistrate may dismiss a complaint on hearing or the county attorney may dismiss the complaint, but such action does not prevent the county attorney from refiling the complaint before another examining magistrate. This court has further held that until an accused is in jeopardy, a criminal action filed against him can be dismissed and refiled at the discretion of the county attorney, subject to the law governing limitations of time within which prosecution may be instituted. Cornell v. State, Okl. Cr. App., 217 P. 2d 528; Bayne v. State, 48 Okl. Cr. 195, 290 P. 354; Ex

Honorable Vernon Frieze

parte Oxley, 38 Nev. 379, 149 P. 992; 16 C.
J.S., Constitutional Law, Sec. 131, page 334;
Hembree v. Howell District Judge, Okl. Cr.
App., 214 P. 2d 458."

In the case of State v. Townsend, 95 P. 2d 328, the Supreme Court of Kansas stated:

"Appellant contends that having been discharged on a preliminary hearing such discharge was a bar to a subsequent preliminary hearing and trial. As the settled law of this state is otherwise, the point is without merit. State v. Jones, 16 Kan. 608; State v. Curtis, 108 Kan. 537, 196 P. 445; State v. Badders, 141 Kan. 683, 42 P. 2d 943.

"In State v. Jones, supra, it was held that a preliminary examination does not put the accused in jeopardy within the meaning of section 10 of the bill of rights."

Numerous other cases of the same purport could be cited, but we do not feel that it is necessary to do so, since the above authority clearly establishes the fact that a preliminary examination does not constitute "jeopardy," and that discharge at a preliminary examination, in the absence of a statute so holding, does not preclude a second preliminary examination on the same charge, which is the question you propounded to us.

CONCLUSION

It is the opinion of this department that the magistrate judge of Benton County is not precluded from holding a preliminary examination, based upon affidavits for state warrants filed in the magistrate court of Benton county, by the fact that previously identical affidavits for state warrants were filed in the magistrate court of Benton county, and that upon a preliminary examination held thereon, same defendant was ordered discharged.

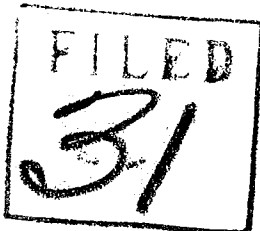
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HFw:ld;da

SCHOOL DISTRICTS: (1) Board of directors may certify amended
TAXATION: estimate under Sec. 165.077, RSMo 1949,
LEVY: at any time prior to action being taken
upon original estimate and (2) such re-
certification is discretionary with board
of directors.



May 4, 1955

Honorable Herbert C. Funke
St. Louis County Counselor
St. Louis County Courthouse
Clayton, Missouri

Dear Sir:

Reference is made to your request for an official
opinion of this department reading as follows:

"I would like to have your opinion as
soon as possible regarding the re-cer-
tifying of a school tax levy after May
15th.

"Section 165.077, RSMo 1949, states:

"The board of directors of each school
district shall, on or before the fifteenth
day of May of each year, forward to the
county superintendent of schools an esti-
mate of the amount of money to be raised
by taxation for the ensuing school year,
and the rate required to produce said
amount, specifying by funds the amount
and rate necessary to sustain the school
or schools of the district for the time
required by law * * *."

"The specific questions I would like your
opinion on are as follows:

"(1) In the event the board of directors
of a school district discovers on about
the First of August that the assessed
valuation of the school district has in-
creased by fifty percent (50%) over the
amount that it was on May 15th, when the

Honorable Herbert C. Funke

estimate was filed, does the board of directors have authority to re-certify a lower rate than they did on May 15th?

"(2) Is it the duty of the board of directors upon the discovery of the increased valuation, to revise their estimate after May 15th, and certify a levy that will produce the same amount of revenue that the levy certified on May 15th would have produced?"

At the outset we wish to direct your attention to a portion of Section 165.150, RSMo 1949, relating specifically to first class high school districts in counties of the first class. Inasmuch as St. Louis County is one falling within such class, the statute is applicable to first class high school districts therein. The portion of the statute referred to reads as follows:

"In all counties of the first class, the qualified voters in any first class high school district may, at any annual meeting provided by law, vote a rate of taxation for school purposes in accordance with the provisions of the constitution of this state, and said rate of taxation for school purposes thus voted shall be authorized and established for the next ensuing four years, unless within said period such rate is changed in like manner, provided that such rate may be decreased by the board of education, without calling an election. * * * * *

It is readily apparent that the statutory authority therein conferred upon the board of directors of such districts is entirely adequate to authorize necessary adjustments in the levy estimated to be required to produce the funds required.

As generally applicable to all school districts, we find Section 165.077, RSMo 1949, which you have quoted in your letter and which for the sake of brevity we will not re-quote.

In construing this statute, the Supreme Court in State ex rel. v. Phipps, 49 S. W. 865, 148 Mo. 31, upheld the propriety

Honorable Herbert G. Funke

of withdrawing an estimate previously made, and sustained the validity of a tax based upon one substituted for such original estimate. This principle was reaffirmed by the same court in Lyons v. School District of Joplin et al., 311 Mo. 349, 278 S. W. 74, from which we quote, 1. c. 78:

"* * * * * The estimate filed under the provisions of section 11142 (now section 165.077, RSMo 1949) may be withdrawn, and revised estimates may be substituted, if done before the first estimates were acted upon, and a valid levy may be made upon such revised estimates. State ex rel. v. Phipps, 148 Mo. 31, 49 S. W. 865."

The foregoing clearly discloses to us that in the event of substantial changes occurring in the valuation of the property within a school district, subsequent to the filing of the original estimate, an amended estimate may thereupon be filed, provided that such action is taken prior to the original estimate having been acted upon. Parenthetically, we observe that the widespread publicity now being given to the action taken by the State Tax Commission looking toward the equalization of property valuations in numerous counties, including St. Louis County, will no doubt bring to the attention of the agency charged with the duty of actually making the levy the necessity of deferring action thereon until possible amended estimates may be filed.

We do not offer any comment upon the second question which you have proposed, inasmuch as the power to file such amended estimates is discretionary with the various school boards affected.

CONCLUSION

In the premises we are of the opinion that a board of directors may file an amended estimate under the provisions of Section 165.077, RSMo 1949, at any time prior to the original estimate filed thereunder having been acted upon by the body imposing the levy required thereunder.

We are further of the opinion that such boards of such school districts are not required to file such amended estimates by reason of changed circumstances arising from increased valuation of property within such school districts.

Honorable Herbert C. Funke

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

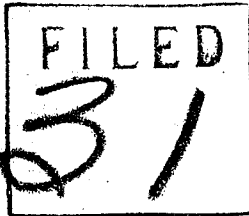
Very truly yours,

JOHN M. DALTON
Attorney General

WFB:DA

SUNDAY:
SHERIFF:
EXECUTIONS:

Writ of executions may be validly served on the first day of the week, commonly called "Sunday."



May 9, 1955

Honorable Herbert Funke
County Counselor
St. Louis County
Courthouse
Clayton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Our County Counselor, Hon. Herbert Funke, has directed me to request your opinion on the following subject:

"Since the repeal of Section 907, R.S. Mo. 1939, by act of the legislature found at Laws of Missouri, 1953, page 353, is it permissible for the Sheriff to seize property under execution, on a Sunday, when the judgment debtor is a non-resident and comes into the County with a valuable automobile each Sunday, or may the Sheriff do so under any other circumstances?

"Under Sections 476.250 and 521.050 R.S. Mo. 1949, the sheriffs can apparently execute a writ of attachment on Sunday under similar circumstances.

"Sections 563.690 through 563.730, R.S. Mo. 1949, do not seem to expressly bar proceedings under an execution, on a Sunday.

"We shall appreciate your advice in this matter."

Through a typographical error you have referred to the repeal of Section 907, RSMo 1949, as having been

Honorable Herbert Funke:

effected by an act found Laws of Missouri, 1953, at page 353; it is to be observed that the correct citation to the act is Laws of Missouri, 1943, at page 353.

Under the statute mentioned, viz., Section 907, RSMo 1939, there was an outright prohibition against the service of process on the first day of the week, commonly called Sunday, except in certain specified instances. However, upon the repeal of this section it, of course, lost its effectiveness and no similar reenactment now appears in the current revised statutes.

We, therefore, must look to general principles of law to determine the propriety of service of a writ of execution on Sunday.

Under the common law only acts of a judicial nature could not be performed on Sunday. This principle was recognized by the St. Louis Court of Appeals in the case of *Said v. Stromberg*, reported 55 Mo. App. 438, wherein we find the following language, i.c. 441:

"* * * On the other hand, if the question is one to be determined by the common law, there would be no illegality in the sale or labor; because, while the common law declared that no judicial act could be legally performed on Sunday, as to all other acts it made no distinction between Sunday and other days of the week. 2 Parsons on Contracts '7 Ed.), 757, note n, and c.c. * * *"

(Emphasis ours.)

The interdiction of the performance of judicial acts on Sunday under the common law has been carried into the statute law of this state through the enactment of Section 476.250, RSMo 1949, which reads as follows:

"No court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging

Honorable Herbert Funke:

a jury; and every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to a jury; but this section shall not prevent the exercise of the jurisdiction of any magistrate, when it shall be necessary in criminal cases, to preserve the peace or arrest the offender, nor shall it prevent the issuing and service of any attachment in a case where a debtor is about fraudulently to secrete or remove his effects."

It, therefore, remains to be determined the nature of the acts involved in the service of a writ of execution. If determined to be a "judicial act" the service thereof is interdicted under the statute; on the other hand, if determined to be a "ministerial act," then it may be validly performed.

A definition of the term "ministerial act" appears in *State ex rel. Folkers v. Welsh*, reported 124 S.W. (2d) 636, from which we quote, i.e. 639-40:

"* * * A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. *State ex rel. Jones et al. v. Cook*, 174 Mo. 100, 118, 119, 120, 73 S.W. 489."

Examination of the statutes applicable to the duties imposed upon a sheriff in the service of a writ of execution disclose them to fall within the above quoted definition of "ministerial acts." We are supported in our reasoning in this regard by the definitions of the term "ministerial officer" found Vol. 27, Words & Phrases, Perm. Ed., 272, particularly and as peculiarly applicable to the matter now under consideration by the statement of the court in *Thomasson v. Kennedy* S.C. 3 Rich. Eq. 440, to the effect that a sheriff is a ministerial officer required to execute the judgments of the courts by levy, sale and application of the proceeds according to fixed rules. Similar duties, of course, are imposed upon sheriffs

Honorable Herbert Funke:

with respect to the service of writs of execution and to return thereof under Missouri statute.

CONCLUSION

In the premises, we are of the opinion that a sheriff may validly serve a writ of execution on the first day of the week, commonly referred to as "Sunday."

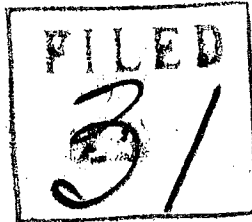
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON
Attorney General

WFB:da:irk

BOARD OF REHABILITATION: Not authorized to purchase
prosthetic devices for employee.



May 13, 1955

Mr. W. E. Freeland
Chairman
Board of Rehabilitation
Department of Labor and
Industrial Relations
Jefferson City, Missouri

Dear Sir:

I have received your request for an opinion of this office,
which request is as follows:

"May I submit a question to you, relative
to an expenditure from the appropriation
of the Sixty-Seventh General Assembly
from the Workmen's Compensation Fund for
the activity of the Board of Rehabilitation.
It is found on Pages 110-111, Laws of
Missouri, 1953. The pertinent part reads:

'For the original purchase of property,
for the repair and replacement of prop-
erty, and for operating expenses in-
cluding travel within and without the
State, and other necessary expenses for
the period beginning July 1, 1953, and
ending June 30, 1955.'

"We have as supervisor a young man who has
lost both arms and one foot. His work is
not only to supervise but to give moral
support and encouragement to victims of
industrial accidents. The success of this
work is such that the insurance companies
who pay for it from a special tax are highly
pleased, since it is putting disabled persons
back to employment and removing them from the
payment of benefits. In numbers of cases
disabled employees are drawing higher salaries
than they had before the accident.

Mr. W. E. Freeland

"Mr. Rousselot has artificial arms and a leg, which he has learned to use with such skill that he is a very valuable asset in the promotion of our activity. His accident occurred when he was about seventeen and he is now not quite twenty-four years of age. I consider him one of the safest auto drivers I have ever ridden with.

"The problem which I present is this. He has his own devices which he has bought and paid for and learned to use. However, I am in receipt of a letter from the National Research Council Amputee Team at the Jewish Hospital in St. Louis. They strongly recommend that an additional set of devices be procured for him, and express the opinion that it would greatly add to the usefulness of his service.

"The problem posed is this. He is quite satisfied with his devices and does not feel justified in expending the \$619.00 which is the estimated cost of the alternative devices. We are advised that if the State can purchase them there is a discount of ten per cent. Naturally, these would have to be fitted to him and, hence, would have value only for his own use. Without any thought of argument, let me submit that certain emoluments do accrue in the course of public service that because of their personal nature are granted to individuals; for instance, as an illustration in a small way, sets of statutes are regularly furnished to members of the General Assembly. These have the names of the members imprinted on the books and are always considered as belonging to the individuals at the end of the session. I would have no hesitancy in submitting a request to buy a brief case for the use of this employee and having his name stamped upon it.

"The devices are considered by this National Research Council as improving greatly the usefulness of his service."

Mr. W. E. Freeland

The statutory provisions for the establishment of the Board of Rehabilitation are found in Sections 287.140, 287.141 and 287.142, MoRS, Cum. Supp. 1953. Section 287.140 deals with the furnishing of medical and hospital treatment by employers to injured employees. Section 287.141 establishes the Board of Rehabilitation consisting of the three members of the Industrial Commission and the Director of the Division of Workmen's Compensation. The Board is required to study the problems of rehabilitation and to investigate and approve rehabilitation services. Provision is made in this section for the employer's offering physical rehabilitation to an injured employee, with provision for payment of benefits in the amount of \$10.00 per week from the Second Injury Fund to the employee during the period of rehabilitation. Provision is also made for hearing before the Board in the event of differences between the employer and the employee regarding the necessity or advisability of physical rehabilitation. Section 287.142 provides:

"All clerical, travel and other expenses incurred in connection with the administration of section 287.141 shall be paid from the workmen's compensation fund."

In your opinion request you have set out the appropriation from which you propose to make this expenditure in question.

In view of the over-all provisions of the rehabilitation statutes and the appropriation act in question, we are unable to discover any authority for the expenditure from this appropriation for the purpose referred to in your opinion request. From your opinion request it is apparent that the devices sought will be provided the individual in question. There is no indication that they are essential to enable him to perform his duties under the act. According to your opinion request he is now supplied with a set of devices with which he is satisfied, and therefore it could not be said that these new devices are essential if he is to perform his duties on behalf of the Board of Rehabilitation. Under such circumstances, we find no authority for the expenditure about which you inquire.

CONCLUSION

Therefore, it is the opinion of this office that the Board of Rehabilitation is not authorized to make an expenditure from

Mr. W. E. Freeland

its appropriation for the purpose of supplying an employee of the Board with an additional set of prosthetic devices.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

TAXATION:
EXEMPTIONS:

Burden of establishing right to exemption from taxation upon person claiming exemption. Each claim for exemption a question of fact must be decided on merits. College fraternities and labor unions not entitled to tax exemption as non-profit, charitable organizations.

June 28, 1955

Honorable Benjamin A. Francka
Assisting Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Mr. Francka:

Reference is made to your request for an official opinion of this office which is as follows:

"We have been requested by our assessor for an opinion as to whether or not the real and personal property of college fraternities and labor unions is exempt from taxation. The property is used exclusively for the activities of the respective organizations owning it. The fraternities, in many instances, operate fraternity houses which are used as a residence for members and for activities of the fraternity. The property is, in most instances, held by a local organization incorporated under a pro forma decree.

"We respectfully request an opinion from your office as to whether the above properties are exempt from taxation."

It must be first concluded that the college fraternities referred to in your letter are Greek letter societies at colleges or universities located in Greene County. It is further assumed that these societies are organized not for pecuniary profit, that their objects and purposes are to provide a home at or near the respective university or college for member students to live at moderate cost while attending the university or college. Another purpose is to promote the general moral, educational, and social welfare of the student members. It is further assumed that the university or college holds no title or interest in the real estate about which the question of assessment and taxation arises.

Honorable Benjamin A. Francka

With the above assumptions in mind, the opinion herewith will be based thereon bearing in mind, however, that the situation could alter the outcome of the opinion where a change in purpose when it is actual could possibly alter the liability for real estate taxes. In regard to purposes for which charitable, educational, or religious organizations are committed, the court in *Midwest Bible and Missionary Institute v. Sestric*, 260 S.W.2d 25, l.c. 29-30 stated as follows:

"(2-6) In *Y.M.C.A. v. Sestric*, supra (362 Mo. 551, 242 S.W. 2d 502), we stated the applicable rule of construction in these words: 'We are mindful of the settled rule that exemption statutes are strictly but reasonably (so as not to curtail the intended scope of the exemption) construed. We also have in mind that charitable use exemption depends upon the use made of the property and not solely upon the stated purposes of an organization.' See also, *Bader Realty & Investment Co. v. St. Louis Housing Authority*, supra. And it is of course true that each tax exemption case is 'peculiarly one which must be decided upon its own * * * facts.' Taxation is the rule. Exemption therefrom is the exception. Claims for exemption are not favored in the law."

In the *Midwest* case the *Midwest Bible and Missionary Institute* owned the buildings, the taxation of which was in controversy. In that case plaintiff showed that it was not only educational and religious but also charitable insofar as it operated by virtue of voluntary contributions to make up a constant annual deficit.

The opinion in the above case gives the constitutional and statutory background of the question involved where at l.c. 29 stated as follows:

"(1) Section 6 of Article X of the Constitution:

" ' Section 6. Exemptions from taxation.--All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies

Honorable Benjamin A. Francka

may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void.'

"(2) Section 137.100 (6) RSMo 1949, V.A.M.S.:

" ' All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes.'
* * *"

As to the words exclusively as used in the Constitution and again in the statute, the court quoted with approval from the case of Spillers v. Johnston, 214 Mo. 656, 113 S.W. 1083, where at l.c. 30 of the Midwest case, supra, it was said as follows:

" * * * In that case this Court concluded that the fact that Colonel Johnston, the owner and active head of the Kemper Academy, lived within the school building with his family was not decisive against exemption but that it served to achieve the school's objectives. It was held there that the words of the statute 'used exclusively' or 'exclusively used' has reference 'to the primary and inherent use as over against a mere secondary and incidental use. * * * If the incidental use (in this instance residing in the building) does not interrupt the exclusive occupation of the building for school purposes, but dovetails into or rounds out those purposes, then there could fairly be said to be left an exclusive use in the school on which the law lays hold.' * * *"

It must be remembered that the college or university not only does not own the fraternity property but only has indirect control over it. By indirect control is meant

Honorable Benjamin A. Francka

control by the rules of the college or university in regard to the conduct of its students with of course power of suspension from school, of the individual members.

In State ex rel. Gehner, 11 S.W. (2d) 1.c. 37, the Supreme Court said:

"It will therefore be seen that the test for tax exemption is not the number of good purposes to which a building may be put, nor the amount of good derived by the general public in the operation of such purposes, but whether the building is used exclusively for religious, educational, or charitable purposes. If it is used for one or more commercial purposes, it is not exclusively used for the exempted purposes, but is subject to taxation."

Here it would be difficult to envision any commercial purpose carried on by a college fraternity. In People ex rel. Delta Kappa Epsilon Society v. Lawler, 77 N.Y.S. 840, 1.c. 843, the court said:

" * * * And while it may be said that the relator is connected with Hamilton College, and that its chapter house is in a certain sense an adjunct thereto, yet so far as ownership, occupation, and control are concerned it is entirely independent of the college. Its primary purpose is to afford the members of the fraternity owning it with an abiding place while attending college. It is there that they eat and sleep; it is there that they mingle with each other in social intercourse; it is there that they entertain their friends, and to that end indulge in dancing and other similar amusements. In short, it is to all intents and purposes a club house, a place for rest, recreation, and fraternal intercourse, rather than for the purposes for which it is claimed to have been organized, which purposes are plainly secondary and incidental; and, such being the case, we do not see how, within the well-settled policy of the law to which allusion has just been made, it is entitled to exemption from taxation."

Honorable Benjamin A. Francka

From the foregoing, since the burden is put upon claimants for exemption by the cases interpreting the constitutional requirements, it is believed that the real and personal property of a college fraternity organized with the usual and ordinary purposes of organization as commonly accepted is certainly not entitled to exemption from taxation. It is not used exclusively for religious worship, for a school or college, and in accordance with common understanding as to the purpose and activity of a college fraternity, its use is not for purely charitable purposes.

As for labor organizations it must be first concluded that the labor unions intended are regular labor unions and are not agricultural or horticultural societies. The latter are exempt by the Constitution and there is no need to justify any possible discrimination or favoritism since they are so exempt.

The only question that appears here is in what position labor unions fit into the exemptions in the constitutional arrangement. They are non-profit. They are organized for the benefit of a great number of people in each community. Some of their work is charitable, but it is difficult to envision a union organized for purely charitable purposes. Again as in the matter of fraternities each individual organization presents a question of fact upon which the general law must be applied. However, the burden of proof is upon the entity claiming an exemption and it must be alleged, claimed, and proved that they are so exempt. It is assumed that the union here in question is a tightly bound group of individuals joined together for the economic protection and advancement of the individuals. In the matter of Integrating the Bar in 259 S.W. (2d) 144, 1.c. 151, the Arkansas Supreme Court said as follows:

" * * * Labor unions are organized primarily for the purpose of bargaining with management in the matter of wages, hours of employment, working conditions, etc. * * * "

Other cases concurring in this definition are: Com. v. Shipherd, 41 A (2d) 429, 431, 157 Pa. Super 27; People v. Graf 24 N.Y.S. (2d) 683, 685, 261 App. Div. 188.

Honorable Benjamin A. Francka

There can be found no provision in the Constitution for the exemption of labor organizations. The mere fact that a corporation is organized not for profit is not justification for tax exemption. This office gave an opinion to that effect May 15, 1947, to Honorable Roy A. Jones, Prosecuting Attorney of Johnson County. That opinion was to the effect that real estate belonging to a non-profit organization is not exempt from taxation. A copy of that opinion is attached hereto. Since the enactment of Ch. 355 Cum. Supplement, 1953, there may be many kinds of not-for-profit corporations. The exemption from taxation, however, is limited by the constitutional provisions of Sec. 6, Art. 10 of the Constitution of 1945.

CONCLUSION

It is therefore the opinion of this office that the burden of establishing a right to exemption from taxation under the Constitution of 1945 is placed upon the entity claiming such a right. Each individual case stands upon its own merits in the establishment of such right. College fraternities as the organizations are commonly known and labor unions are not entitled to exemption from taxation except where those organizations have as their primary and inherent purposes activities purely charitable.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. James W. Faris.

Yours very truly,

JOHN M. DALTON
Attorney General

JWF:gm

Enclosure

5/15/47 to Roy A. Jones

HIGHWAYS:
COUNTIES:
ACQUISITION OF RIGHTS-
OF-WAY:

St. Louis County is not liable for the costs of acquisition of rights-of-way acquired by the State Highway Commission for a road to be built through the aforesaid county, in the absence of a contract so providing.



August 23, 1955

Mr. Herbert C. Funke
St. Louis County Counselor
Law Department
Courthouse
Clayton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I am requesting your opinion in the following matter:

"The Missouri State Highway Commission, having the authority to locate Primary Highways, has designated its route TR 40 through the City of Richmond Heights from a point on Hanley Road, near its intersection with Eager Road, and extending Eastwardly through said City to the City limits of St. Louis in the city block between West Park and Wise Avenues. The authorities of the City of Richmond Heights object to said location and refuse to make any contribution toward the acquisition of rights-of-way; and the authorities of St. Louis County have not entered into any contract with the Highway Commission for said road or to make any contribution for acquisition of rights-of-way. According to the 'policy' of the State Highway Commission, local authorities in urban areas are required to furnish one-half the cost of acquisition of these rights-of-way. Highway TR 40 is one of the Federal aid primary routes eligible for improvement with Federal funds to the extent of one half of the cost, and having been so designated, the Highway Commission is obligated under the provisions of Section 226.150, RSMo. 1949, to proceed with the construction.

Mr. Herbert C. Funke

"I therefore request your opinion on the following question:

"If the State Highway Commission goes forward with the acquisition of rights-of-way and construction on the above route, is St. Louis County liable for one-half the cost of acquisition of the rights-of-way and could such cost be recovered from the County through legal action, even though St. Louis County never enters into any contract with the State Highway Commission for the purchase or acquisition of said rights-of-way?"

We observe, first, that if St. Louis County is liable for one-half the cost of acquisition of the rights-of-way referred to above by you, there must be some definite statement in the law in which, under the circumstances set forth by you, St. Louis County would be liable for such costs. We are entirely unable to find, in the law or the cases, where any such liability is imposed upon St. Louis County. Section 227.170, RSMo. 1949 states that a civil subdivision, which Section 226.010 RSMo. 1949 defines a county to be, may "convey right of ways to the State of Missouri." That section reads:

"Any civil subdivision as defined in Section 226.010, RSMo. 1949, shall have the power, right and authority, through its proper officers, to contribute out of funds available for road purposes all or a part of the funds necessary for the purchase of right of ways for state highways, and convey such right of ways or any other land, to the state of Missouri to be placed under the supervision, management and control of the state highway commission for the construction and maintenance thereupon of state highways and bridges. Funds may be raised for the purpose of this section in such manner and such amounts as may be provided by law for other road purposes in such civil subdivision; provided, that there shall not at any time be any refund of any kind or amount to said civil subdivision by the state of Missouri for lands, acquired under this section."

Mr. Herbert C. Funke

The only case which we have been able to find which relates to this matter is that of Reilly v. Sugar Creek Township of Harrison County, 139 S.W. 2d. 525. There, however, the issue was not whether the township, which was a political subdivision, could be forced to pay for the right-of-way but whether it could legally do so out of funds voted by it for the purpose of constructing roads. The court held (l.c. 528):

"We rule that Sugar Creek Township was authorized to pay for the right of way out of the funds voted for the purpose of constructing roads."

CONCLUSION

It is the opinion of this department that St. Louis County is not liable for the costs of acquisition of rights-of-way acquired by the State Highway Commission for a road to be built through the aforesaid county, in the absence of a contract so providing.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

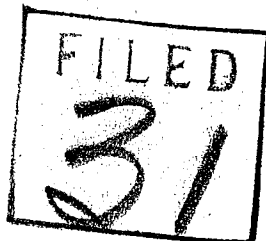
Very truly yours,

John M. Dalton
Attorney General

HPW:sm:mw

ANNEXATION:
TOWNS AND VILLAGES:
UNINCORPORATED LAND:

The provisions of Section 71.015, RSMo Cumulative Supplement 1953, have no application to the procedure for the extension of boundaries by the annexation of unincorporated areas by any village in the state.



September 8, 1955

Honorable Herbert C. Funke
County Counselor
St. Louis County
Clayton, Missouri

Dear Sir:

For the sake of brevity we will merely set out the questions presented in your request and not the circumstances that gave rise to such. Such question as stated in your letter reads as follows:

"* * * The question I would like your opinion on is: 'Is it required as a pre-requisite for the extension of the boundaries of any village, that it shall first go to the circuit court for a declaratory judgment under the provisions of Section 71.015, RSMo 1953 Supplement, before petitioning the county court or county council for an extension of its boundaries?'"

Section 71.015, RSMo Cumulative Supplement 1953, reads as follows:

"Whenever the governing body of any city has adopted a resolution to annex any unincorporated area of land, such city shall, before proceeding as otherwise authorized by law or charter for annexation of unincorporated areas, file an action in the circuit court of the county in which such unincorporated area is situated, under the provisions of Chapter 527 RSMo, praying for a declaratory judgment authorizing such annexation. The petition in such action shall state facts showing:

Honorable Herbert C. Funke

"1. The area to be annexed;

"2. That such annexation is reasonable and necessary to the proper development of said city; and

"3. The ability of said city to furnish normal municipal services of said city to said unincorporated area within a reasonable time after said annexation is to become effective. Such action shall be a class action against the inhabitants of such unincorporated area under the provisions of Section 507.070, RSMo." (Emphasis ours.)

Section 80.030, RSMo 1949, has to do with the annexation of unincorporated areas and the extension of boundaries of villages in the state. Said section reads as follows:

"Whenever any town or village shall have been so incorporated, or shall have been incorporated by any special act or charter, and any tract or tracts of land, any part of which has been improved or any land adjoining the same that has been or shall be subdivided into town lots or streets, and a plat thereof filed with the recorder of deeds as an addition to such town or village, or any such tract or tracts of land or any such addition, or any part thereof, is not included within the metes and bounds of such incorporated town or village, the town council or board of trustees, when it desires to have such addition or additions included within such corporate limits, shall file a petition with the county court asking that the same, and such other lands as may be necessary to make the boundary of such town or village and addition even and regular, be added to and included within the corporate limits of such town or village; which said petition shall particularly describe such premises and be accompanied by a plat thereof; the county court shall then hear the evidence offered by the parties interested, and may, if it deem it just and proper, order that the whole or such part of said premises as it may think right, be added to and included

Honorable Herbert C. Funke

within the incorporated limits of said town, and shall spread such order, particularly describing the premises added to the corporation, upon the records of the court; and when such addition is so added, it shall be a part of the original incorporation, and entitled to all the privileges thereof; provided, however, that no tract of ten acres or more of any unplatted or unsubdivided land used for farming, gardening, horticultural or dairying purposes shall be included in a town by such extension of boundaries without consent of the owner of such tract."

The problem thus presented is whether a village before annexing unincorporated areas through its county court as outlined above in Section 80.030 must follow the procedure of Section 71.015. In order to answer this question first it is necessary to ascertain whether the Legislature intended Section 71.015 to cover villages as well as cities in the state and it will be noted that in Section 71.015 there is no reference at all to villages, but only to cities. The question then is whether the term "city" as used in Section 71.015 includes the term "village" as found in Section 80.030. In the case of State ex rel. Scott v. Lichte, 226 Mo. 273, 126 S.W. 466, the Missouri Supreme Court in construing the term "city and town" and the term "town or village" came to the conclusion that as it is used in the Constitution of 1875 the Legislature construed the term "cities and towns" to mean cities and the term "town or village" to mean village. The court also stated that the term "city" is used to designate the larger class towns and the name "village" is used for small urban communities. The court goes on to state that the term "city" is to be differentiated from the term "village" and the word "city" applied to large communities, the word "village" to small communities. Applying this reasoning to Section 71.015, this office believes it was the intention of the Legislature that the procedure outlined in Section 71.015 is to be applied to cities of the four classes, since the term "city" is used in said section, and that the Legislature did not intend said section to be applicable to the procedure of villages in annexing unincorporated areas of land since the term "village" is not used in said section and the term "city" which is used in said section does not include in its meaning the term "village."

This belief is also fortified by the fact that in applying the procedure outlined in Section 71.015, to the procedure

Honorable Herbert C. Funke

already applicable to villages under Section 80.030 in annexing unincorporated areas, there is a duplicity of court action inasmuch as under Section 71.015 there must be a petition filed in the circuit court for the annexation of the unincorporated area and under Section 80.030 there must be a petition filed by the village trustees or town council in the county court for the annexation of unincorporated areas. Thus, we would have a duplicity and conflict of court action on the same subject by two different courts. This office does not believe it reasonable to infer that the Legislature so intended Section 71.015 to be applied, but it is more reasonable to say that the Legislature intended Section 71.015 to be applicable to cities of the four classes when such procedure as outlined in Section 71.015 supplements and does not conflict with the procedure already provided for in the annexation of unincorporated areas by cities of all four classes since the procedure by the cities for the annexation of unincorporated areas is by the city council or by the city council and voters of the city and it did not, prior to Section 71.015, involve court action. Thus, this office believes that the Legislature did not intend Section 71.015 to be applicable to villages in the annexation of unincorporated areas and that a village need not follow the procedure provided for in Section 71.015 before it annexes an unincorporated area.

CONCLUSION

It is the opinion of this office that the provisions of Section 71.015, RSMo Cumulative Supplement 1953, have no application to the procedure for the extension of boundaries by the annexation of unincorporated areas by any village in the state.

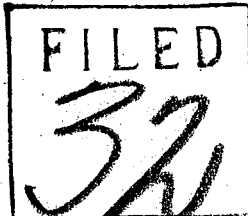
The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

Very truly yours,

John M. Dalton
Attorney General

HLV:vlw

CONSTABLES: It is the duty of the several constables of St. Louis County to attend the magistrate court or courts of said county and to serve the process appertaining to the business of the court or courts. If any doubt exists as to what officer should discharge either of the above-mentioned duties, such question may be resolved by ordinance of the county council.



April 12, 1955

Hon. Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

Reference is made to your request for an opinion of this office, which request reads as follows:

"We wish to request an opinion of your office on the following matter:

"In St. Louis County, under the Charter, we are limited to four Constables and Constabulary Districts. However, we have five Magistrates and Magistrate Districts under the State law. Constable Districts One and Two each include a part of Magistrate District Five.

"Our question is what officer of this County is under a duty to, first, attend the sessions of Court in the Fifth Magistrate District, and second, to execute the process of the Court."

As you have indicated, St. Louis County has adopted a charter form of government authorized by Section 18 of Article VI of the Constitution of Missouri. Article II, Section 3, of the St. Louis County Charter adopted by vote of the people on March 28, 1950, relating to elective county officers, provides that there shall be elected "four constables." This provision is in conformity with Section 18(b) of Article VI of the Constitution of Missouri which provides that the charter shall provide for the number and kinds of county officers. Said constitutional provision further provides that the charter shall

Hon. Edward W. Garnholz

provide for "the exercise of all powers and duties of * * * county officers prescribed by the Constitution and laws of the state." Section 2 of Article I of the county charter does so provide in the following language: "The County shall have all the powers now or hereafter vested by the Constitution and laws of Missouri in * * * county offices, * * * and all the powers provided in this Charter, * * *."

The general statutory provisions relating to the office of constable are found in Chapter 63, Revised Statutes of Missouri 1949. Section 63.065, RSMo Cum. Supp. 1953, provides for the duties of constable as follows:

"In all counties of the first class operating under a charter form of government a constable shall devote his entire time to the duties of his office and shall serve and execute all warrants, writs of attachment, subpoenas and all other process, both civil and criminal, appertaining to the business of such magistrate district, and he shall act as conservator of the peace within his county. He or a deputy shall attend the magistrate court of his district when in session, preserve order therein, and perform such other duties as may be directed by the magistrate or provided by law, and shall be authorized to execute and serve process outside of his district, and at any place within the county. Writs and process directed from one county to any county in the first class may run in the name of any constable in the county."

While this office has held in an opinion to Stanley Wallach, prosecuting attorney, St. Louis County, under date of October 30, 1953, that certain provisions of Chapter 63 were, insofar as they attempted to establish offices or fix the salary of officers, violative of Section 18(e) of Article VI of the Constitution, we are of the opinion that said constitutional provision did not render void other provisions relating to the duties of an office so far as they have been made applicable by the Constitution and charter. A copy of the opinion of this office referred to is herewith enclosed for your information.

Hon. Edward W. Garnholz

It is to be noted that Section 63.065 provides that a constable shall serve and execute all warrants, writs of attachment, subpoenas and all other process appertaining to the business of the magistrate "courts" in his county. We note also that it is provided that a constable shall attend the magistrate court of his district when in session. The latter-noted provision is somewhat meaningless, in view of the fact that magistrate courts in counties having more than one magistrate do not sit in districts. Article V, Section 19, of the Constitution provides that each magistrate in counties having more than one magistrate shall have jurisdiction coextensive with the county. Therefore, we are of the opinion that each constable is authorized and empowered to attend and serve the process of each magistrate in the county. Insofar as the duties may be overlapping or doubtful, we direct your attention to Section 96 of the St. Louis county charter, which provides as follows:

"If any doubt shall exist as to what department, officer or agency of the County should exercise or perform any power or duty conferred or imposed by law or by this Charter, the Council by ordinance shall specify by whom such power or duty shall be exercised or performed."

CONCLUSION

Therefore, it is the opinion of this office that it is the duty of the several constables of St. Louis County to attend the magistrate court or courts of said county and to serve the process appertaining to the business of the court or courts. It is the further opinion of this office that if any doubt exists as to what officer should discharge either of the above-mentioned duties, such question may be resolved by ordinance of the county council.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG/vtl
Enc.- 10-30-53 to Stanley Wallach

HIGHWAY PATROL:
WEIGHT:
TESTIMONY:



Members of the Missouri State Highway Patrol may stop upon the highway a motor vehicle which the patrolman has reason to believe is in excess of the weight limit allowed by the laws of this state; may direct the driver of such vehicle to proceed with the vehicle to the nearest weight station; may cause the vehicle to be weighed; and if it be found to be in excess of the weight limit aforesaid, the patrolman may file charges against the driver of the vehicle and testify in court regarding the weight.

August 30, 1955

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"In recent months our office has encountered difficulty in aiding the State Highway Patrol in the enforcement of the Road Laws provided in Section 304.180 and 304.190 of the Missouri Statutes. We are losing these cases on Motions to Suppress evidence of the weight involved, where the Patrol Officer arrests a driver and leads him to a weight station.

"The argument raised is that this is an unlawful seizure as the search and seizure powers of the Highway Patrol are expressly defined in Section 43.200. Such powers allow only a search and seizure for dangerous weapons. Along with this it has been argued that enforcement of those laws is given exclusively to Sheriffs, Peace Officers and Maintenance Men at the State Highway Department as provided in Section 304.230.

"The question of lawful arrest also arises when a Patrol Officer stops a truck on mere suspicion of a violation, such load violations being only misdemeanors.

Honorable Edward W. Garnholz

"The Highway Patrol as well as our Office is greatly concerned over the enforcement of these laws and, therefore, we are hereby requesting an official Opinion from your Office as to these matters."

Unless otherwise indicated, all references are to RSMo 1949.

Sections 304.180 and 304.190, to which you refer, were amended and reenacted as amended in 1951 (Laws, 1949, p. 695). These sections set forth the maximum weight which a motor vehicle may have upon any one axle or group of axles on the highways (Section 304.180) and in or within two miles of the corporate limits of a city of seventy-five thousand or over (Section 304.190).

Section 304.240 makes violation of these two above sections a misdemeanor.

There can be no question but that the highway patrol is vested with authority to enforce Sections 304.180 and 304.190, supra.

Section 43.160 specifically so states. That section reads in part:

"It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission.* * *" (Underscoring ours).

We also note Section 43.180 which reads:

"The members of the state highway patrol, with the exception of the director of radio and radio personnel, shall have full power and authority as now or hereafter vested by law in peace officers when working with and at the special request of the sheriff of any county, or the chief of police of any city, or under the direction of the superintendent of the state highway patrol, or in the arrest of anyone violating any law in their presence or in the apprehension and arrest of any fugitive from justice on any felony viola-

Honorable Edward W. Garnholz

tion. The members of the state highway patrol shall have full power and authority to make investigations connected with any crime of any nature. The expense for the patrol's operation under this section shall be paid monthly by the state treasurer chargeable to the general revenue fund, provided, however, the amount appropriated from the general revenue fund shall not exceed ten per cent of the total amount appropriated for the Missouri state highway patrol."

Also Section 43.190, which reads:

"The members of the patrol, with the exception of the director of radio and radio personnel, are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of this state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator whenever he may be overtaken."

It will be noted that the above section 43.190 states that "members of the patrol shall have the power now or hereafter vested by law in peace officers. * * *"

Section 304.230 reads in part as follows:

"1. It shall be the duty of the sheriff of each county or city to see that the provisions of sections 304.170 to 304.240, are enforced and any

Honorable Edward W. Garnholz

peace officer or police officer of any county or city shall have the power to arrest on sight or upon a warrant any person found violating or having violated the provisions of said sections.

"2. The sheriff or any peace officer is hereby given the power to stop any such conveyance or vehicle as above described upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of sections 304.170 to 304.240 and if he finds such vehicle loaded in violation of the provisions hereof he shall have a right at that time and place to cause the excess load to be removed from such vehicle.* * *"

Since Section 43.190 gives members of the patrol the power of peace officers, and since Section 304.230 gives peace officers the power to stop any vehicle on the highway to determine whether said vehicle is overloaded, it, of course, follows that members of the patrol can stop any vehicle on the highway to determine whether it is overloaded. We believe that the above disposes of the contention that enforcement of the weight laws is not vested in members of the highway patrol.

You call our attention to Section 43.200, which reads:

"The members of the patrol shall not have the right or power of search nor shall they have the right or power of seizure except to take from any person under arrest or about to be arrested deadly or dangerous weapons in the possession of such person."

Inasmuch as the express duty is imposed upon the Highway Patrol by Section 43.160, supra, to enforce and prevent violation of laws relating to the weight of commercial motor vehicles, we do not believe that the Legislature, by its prohibition against "search" and "seizure" by the Highway Patrol, as stated in Section 43.200, supra, meant to prohibit a reasonable direction by a member of the patrol to the driver of a commercial motor vehicle to take his vehicle to the nearest weighing facilities in order that the patrolman might carry out the duty imposed upon him by the aforesaid Section 43.160, supra.

In the third paragraph of your letter you state:

"The question of lawful arrest also arises when a Patrol Officer stops a truck on mere suspicion of a violation, such load violations being only misdemeanors."

Honorable Edward W. Garnholz

In this regard we direct your attention to the case of State v. Collins, 172 S.W.(2d) 284. At l.e. 291, the court said:

"Except for situations where the right is specially given by statute, a peace officer has no authority, without a warrant, to arrest a person charged with the commission of a misdemeanor unless the offense was committed in the officer's presence. Greaves v. Kansas City Junior Orpheum Co. 229 Mo. App. 663, 80 S.W.2d 228; Wehmeyer v. Mulvihill, 150 Mo. App. 197, 130 S.W.681. The offense of which relator was suspected was of course a misdemeanor - the crime of petit larceny growing out of the theft of a grease gun shown to have been worth from twelve to fifteen dollars. Sec. 4469, R.S.Mo. 1939, Mo. R.S.A. sec. 4469. * * *"

In your situation the offense was committed in the presence of the peace officer, and the right to arrest without a warrant is "specifically given by statute" to-wit, Section 43.190, supra. Furthermore, in answer to this, we refer back to an earlier part of this opinion in which we pointed out that a member of the patrol is given the power (except to serve civil process) of peace officers (43.180) and that peace officers are given the power (304.230) to stop any vehicle "for the purpose of determining whether said vehicle is loaded in excess of the provisions of Sections 304.170 to 304.240, and if he finds such vehicle loaded in violation of the provisions hereof he shall have a right at that time and place to cause the excess load to be removed from such vehicle.* * *"

CONCLUSION

It is the opinion of this department that members of the Missouri State Highway Patrol may stop upon the highway a motor vehicle which the patrolman has reason to believe is in excess of the weight limit allowed by the laws of this state; may direct the driver of such vehicle to proceed with the vehicle to the nearest available weighing facilities and may cause the vehicle to be weighed; and if it be found to be in excess of the weight limit aforesaid, that the patrolman may file charges against the driver of the vehicle and testify in court regarding the weight.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

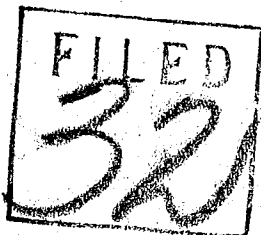
Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

COUNTY MEMORIAL
HOSPITALS:
STATE AID:

Section 13.600 of the 1955-1957 State of Missouri Appropriation Law does not authorize any additional amount to a county for its memorial hospital if the county has received its full authorization of \$10,000 under the provisions of Section 184.290.



November 17, 1955

Honorable C. Rouss Gallop
Director, Department of Welfare
Health and Welfare
State Office Bldg.
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Confirming our telephone conversation of last Friday, perhaps we could help your County and mine if we could get a favorable opinion on Section 13.600, Page 183 of the 1955-1957 State of Missouri Appropriation Laws.

"Audrain County received \$10,000 for the memorial addition to the hospital and I understand Callaway County did too. As I read this Section, it seems to me that for this biennium, for the purpose of memorial additions, County Hospitals are entitled to \$20,000.

"If this was throwing money away, I naturally wouldn't be in favor of it, but it seems the Legislature has set this up for a good cause and I think we should take advantage of it if at all possible."

Section 13.600 of the 1955-1957 State of Missouri Appropriation Law (House Bill No. 588) reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the Post-war Reserve Fund, the sum of Twenty Thousand Dollars (\$20,000.00), for the purpose

Honorable C. Rouss Gallop

of granting aid to counties of this state which comply with all provisions of law relating to the granting of such aid, and for the purchase or erection of a memorial hospital or erection of a memorial addition to an existing county hospital, commemorating the services of our Armed Forces during World War II, for the period beginning July 1, 1955 and ending June 30, 1957."

All reference to statutes, unless otherwise indicated, will be to Revised Statutes of Missouri 1949.

Section 305.230 reads as follows:

"In appreciation of the services of our gallant armed forces and to perpetuate the memory of their heroic achievements in the war against Germany, Japan and their allies and to promote the advancement of aviation in the name of those who gave their lives as members of our gallant forces in the war against the aforesaid enemies, cities, towns and counties are hereby authorized to purchase sites and construct and operate airfields in such counties or near such cities and towns and to receive free technical advice from the division of resources and development; provided further, that when any city, town or county in Missouri shall certify to the governor that it has appropriated a specific sum for the aforesaid purpose and is ready to proceed with the purchase or construction of such airfields a like sum not exceeding ten thousand dollars shall be allotted to said city, town or county from the appropriation herein made for such purpose but said sum shall be released to such city, town or county only after the division of resources and development has certified to the governor that in their judgment the airfield in question is desirable and in the interest of the development of aviation and that the funds proposed are adequate to complete the project; and provided further, that cities, towns or counties are hereby authorized to receive federal grants

Honorable C. Rouss Gallop

in addition to all other grants or funds made available for such purpose under this section."

Section 184.290 reads as follows:

"Any county in this state, except as provided in section 184.300, shall be eligible to receive state financial aid to be paid from moneys appropriated therefor upon certification to the governor by the county court that such county has available an adequate sum of money to be used for the purchase or erection and the operation of a county memorial hospital, or a memorial addition to an existing county hospital, commemorating the services of our armed forces during World War II and upon certification to the governor by the director of the division of health of the state department of public health and welfare that the purchase or erection and operation of the proposed county memorial hospital, or a memorial addition to an existing county hospital, is, in his judgment, in the interest of public health and welfare and that sufficient funds are available to finance not only the purchase or erection of the memorial hospital, or a memorial addition to an existing county hospital, but also the operation of such hospital. State financial aid allocated to a county eligible for aid under the provisions of sections 184.290 and 184.300 shall be equivalent to the amount of money actually expended by the county in the purchase or erection of a memorial hospital, or a memorial addition to an existing county hospital, but in no case shall such state financial aid to any county exceed ten thousand dollars."

Section 184.300 reads as follows:

"Any county which has received any state financial aid under the provisions of section 305.230, RSMo 1949, shall not be eligible for state financial aid under the provisions of sections 184.290 and 184.300. Any county receiving state financial aid under the provisions of sections 184.290 and

Honorable C. Rouss Gallop

184.300 shall not be eligible to receive state financial aid under the provisions of section 305.230, RSMo 1949."

It would appear that Section 184.290, supra, clearly limits the aid to a county to \$10,000. The words "in no case" do not mean "at any one time."

Section 13.600 is not a basic, enabling act. It is an appropriation act, raising money that the enabling act, Section 184.290, authorizes.

Section 13.600 merely appropriated \$20,000. It did not amend Section 184.290, not attempt to amend it, by raising the amount from ten to twenty thousand.

"Sections 184.300 and 305.230 are not invalid here since the question concerns additional amounts only under 184.290. The question is: Does Section 13.600 of the appropriation act amend Section 184.290 by raising the amount to \$20,000? The answer is: It does not."

CONCLUSION

It is the opinion of this department that Section 13.600 of the 1955-1957 State of Missouri Appropriation Law does not authorize any additional amount to a county for its memorial hospital if the county has received its full authorization of \$10,000 under the provisions of Section 184.290.

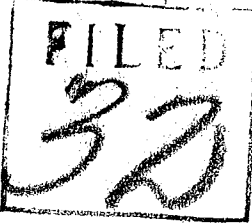
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW/ld/bi

SEARCH WARRANTS: Search warrants may be directed to any peace officer.



December 20, 1955

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Clayton 5, Missouri

Attention of L. L. Bornschein
Assistant Prosecuting Attorney

Dear Sir:

In your recent request for an opinion you wrote:

"Prior to the St. Louis County Police Department's being, we directed all Search Warrants to the Sheriff, irrespective of whether same were to be executed in incorporated or unincorporated areas, this County.

"To whom should such be now directed? We receive applications therefor from various police departments of incorporated areas. Should such warrant in such cases be directed to such police chief, the Superintendent of the St. Louis County Police Department, or to any peace officer of St. Louis County."

For a good many years the statute, now Section 542.270, RSMo 1949, stated that the search warrants should be directed to the sheriff or constable. Now, of course, since the establishment of the St. Louis County Police Department, the superintendent of county police would be substituted for the sheriff. For many years, also, it has been the law of the state that the search warrants could be executed by a public officer. See Section 542.290.

The supreme court, presumably under its authority in Section 5, Article V, of the Constitution, provided in rule 33.01 of its rules of criminal procedure, that the warrant should be "directed to any peace officer."

Honorable Edward W. Garnholz

CONCLUSION

It is the opinion of this department that rule 33.01 supersedes Section 542.270, RSMo 1949, and that the rule is valid and controlling upon all courts of this state. It therefore follows that it is immaterial whether your search warrants are directed to the chief of police in one of the incorporated areas, the superintendent of the St. Louis County Police Department, or to any other peace officer in St. Louis County.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

RSN:lc

ARRESTS: (a) A defendant in a criminal case need not be
POLICE: arraigned in open court before his commitment
ST. LOUIS COUNTY: to jail; (b) In St. Louis County, a person may
not be arrested for a misdemeanor without a war-
rant, unless the arresting officer saw the mis-
demeanor committed. The above is true for police
officers of a municipality or a county and whether the misdemeanor is
a violation of a state law or a city ordinance. County and city ordi-
nances cannot set aside a state law.

FILED

32

December 27, 1955

Honorable Edward Garnholz
Prosecuting Attorney
St. Louis County
Courthouse
Clayton 5, Missouri

Dear Sir:

In your letter to us of November 10, 1955, you request our of-
ficial opinion upon a number of questions. These we will consider
in the order in which you ask them. All references to statutes
will be to RSMo 1949, unless otherwise indicated.

Your first question is:

"A defendant is arrested, his bond set ex parte,
and his case set for trial on a date convenient
to the court in view of its docket situation.
Should this defendant be arraigned in open court
before his commitment to jail; if so, when.* * *"

In reference to this question we direct attention to Supreme
Court Rule 25.04, which reads:

"Arraignment shall be conducted in open court and
shall consist of reading the indictment or informa-
tion to the defendant or stating to him the sub-
stance of the charge and calling on him to plead
thereto. A defendant may plead not guilty or guilty.
The court may refuse to accept a plea of guilty, and
shall not accept the plea without first determining
that the plea is made voluntarily with understanding
of the nature of the charge. If a defendant refuses
to plead or pleads equivocally, or if the court re-
fuses to accept a plea of guilty, or if a defendant
corporation fails to appear, the court shall enter a
plea of not guilty. If a defendant is tried as if he
had been arraigned and entered a plea of not guilty,

the failure of the record to show arraignment and the entry of such plea shall not constitute reversible error."

While the above rule holds that "if a defendant is tried as if he had been arraigned and entered a plea of not guilty" whereas he had not been arraigned, such lack of arraignment will not constitute reversible error, yet the rule makes quite clear the fact that arraignment should be had. In general, the question is when it should be had, and specifically whether it should be had before a defendant who has been arrested, had his bond set, and his case set for trial, is committed to jail.

From your statement of your question it would seem that you contemplate a situation in which the defendant is arrested, brought into court, has his bond set and his case set down for trial, all at the same time and in one continuous operation. Your question is whether, sometime during this process, he should be arraigned, that is, called upon to plead guilty or not guilty, before he is committed to jail.

From a reading of Supreme Court Rule 25.04, supra, it would seem to us that arraignment, as a part of the above-described process before commitment to jail, was not contemplated by it.

It will be noted that the rule states that "arraignment * * * shall consist of reading the indictment or information to the defendant, or stating to him the substance of the charge * * *." In such a situation as you present, there might be a grand jury indictment to be read to the defendant, but there could not be an information, since an information in a felony case can only come after a binding-over at a preliminary examination, which could not have taken place in the situation you describe. Furthermore, a defendant, in the situation set forth by you, would have no time to consult with counsel or to consider and evaluate the situation. We believe your question is answered by Supreme Court Rule 25.03, which reads:

"The defendant in an indictment or information shall not be required to plead thereto until he shall have had a reasonable time in which to examine the same and to prepare his pleading."

Certainly requiring a defendant to plead under the circumstances set forth by you could not by any one be construed as giving him "a reasonable time in which to examine the same", that is the indictment or information, even if they were in existence at that time, which, in the case of a felony charge, we have shown could not by its very nature be in existence at the time of the defendant's arrest. As bearing upon this matter, we also direct attention to Supreme Court Rule 25.02, which reads:

Honorable Edward Garnholz

"Whenever an indictment is found, or an information filed, in a court of record, it shall be the duty of the clerk, upon the request of the defendant therein, to make out and deliver to him a copy of such indictment or information with all endorsements thereon."

In the light of the above we hold that a defendant who has been arrested, had his bond set, and his case set for trial, should not be arraigned before his commitment to jail. We do not attempt to pass upon the time, after commitment to jail, when arraignment should be had, since you do not ask that question.

Your second question is:

"If a misdemeanor is committed in the presence of a police officer of municipality 'A' in St. Louis County and pursued to municipality 'B' in St. Louis County, where officers of municipality 'B' apprehend the suspect, can the suspect be 'booked' in municipality 'B' as a fugitive from municipality 'A' and then turned over to officers from municipality 'A' in the absence of a warrant, to be returned for trial in municipality 'A'?"

In view of the fact that in St. Louis County in order for a person to be liable to an arrest without a warrant for a misdemeanor, the misdemeanor must have been committed in the presence of the arresting officer; and since the police officers of municipality "B" did not view the commission of the misdemeanor, we do not believe that they had any authority to arrest the suspect in the situation which you hypothecate, and that, since the arrest was illegal, they were without authority to take subsequent action whatever in regard to the suspect.

In the case of *State v. Collins*, 172 S.W.2d 284, at l.c. 291, the court stated:

"Except for situations where the right is specially given by statute, a peace officer has no authority, without a warrant, to arrest a person charged with the commission of a misdemeanor unless the offense was committed in the officer's presence. *Greaves v. Kansas City Junior Orpheum Co.*, 229 Mo. App. 663, 80 S.W. 2d 228; *Wehmeyer v. Mulvihill*, 150 Mo. App. 197, 130 S.W. 681. The offense of which relator was suspected was of course a misdemeanor--the crime of petit larceny growing out of the theft of a grease gun shown to have been worth from twelve to fifteen dollars. Sec. 4469, RSMo 1939,

Honorable Edward Garnholz

Mo. R.S.A Sec. 4469. Moreover, the offense, if any, was not committed in Collins' presence so as to have dispensed with the necessity that he have a warrant as his authority for making the arrest."

In view of the above, the answer to your second question is in the negative.

Your third question is:

"If the suspect was arrested by police officers of the St. Louis County Police Department instead of officers of municipality 'B' would your answer to question (2) above be the same?"

The answer to this question is the same as the answer to your second question, and for the same reason.

Your fourth question is:

"If the offense referred to in question (2) or (3) above were a city ordinance violation, would the answers be the same?"

The primary question here is whether municipal peace officers in municipality "B" would have any right to arrest in municipality "B" a person who had violated an ordinance of municipality "A" in municipality "A". The assumed situation is, of course, that the person violating the ordinance of "A" in "A" came over into "B" and that the arresting officers in "B" did not witness the commission of the violation in municipality "A".

In this regard we refer to police provisions applicable to third class cities, and specifically to Section 85.540, which holds that the marshal in cities of the third class shall have power at all times to make or order an arrest with proper process for any offense against the laws of the city, and which further holds that the marshal shall also have power to make arrests without process in all cases in which the offense against the laws of the city shall be committed in his presence. Also Section 85.580, which holds that the policemen of a third class city shall have the same power as the marshal relative to the arrest and commitment of all offenders against the laws of the city.

From the above it is plain that police officers of a third class city have the power to arrest for the violation of the laws of their city, but that they are limited to such violations so far as the violation of city laws is concerned, and that they do not have the power to arrest for the violation of the laws of any other city than their own.

Section 85.610 applies to fourth class cities and makes similar provisions in regard to the power of arrest, as did Section 85.540 referred to above.

Honorable Edward Garnholz

Section 85.620 gives the members of the police force of a city of the third class the same arresting powers as the marshal.

Section 80.410 refers to the powers of arrest in towns and villages, and reads as follows:

"The town marshal shall be chief of police, and shall at all times have power to make or order all arrests, with proper process, for any offenses against the laws of the state, or of the town, by day or by night, and bring the offender to trial before the proper court, and he shall have power to arrest without process in all cases where any such offense shall be committed, or attempted to be committed, in his presence."

Section 80.420 reads as follows:

"The policemen of the town, in the discharge of their duties, shall be subject to the orders of the marshal only as chief of police; but any marshal, assistant marshal or policeman may be instantly removed from his office by the board of trustees at a regular or called meeting, for any wanton neglect of duty."

Your fifth question is:

"Would the answers to questions (2), (3) and (4) above be any different:

- a. If county ordinances authorized county police to make arrests in this situation?
- b. If city ordinances of municipalities authorize county police to make arrests in this situation?"

If county and city ordinances authorized county police to make arrests in these situations, our answers above would be the same because, as was stated in the case of State v. Collins, supra, a peace officer, in the absence of a statute authorizing him to do so (and there is no such statute applicable to St. Louis County), cannot arrest for a misdemeanor not committed in his presence. This is the law of the State of Missouri and it certainly cannot be changed, negatived, or set aside by a county or city ordinance.

CONCLUSION

It is the opinion of this department that: (a) a defendant in a criminal case need not be arraigned in open court before his commitment to Jail in case he does not make bond; (b) In St. Louis

Honorable Edward Garnholz

County a person may not be arrested for a misdemeanor without a warrant unless the arresting officer saw the misdemeanor committed.

The above is true for police officers of a municipality or a county, whether the misdemeanor is a violation of a state law or a city ordinance. County and city ordinances cannot set aside a state law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

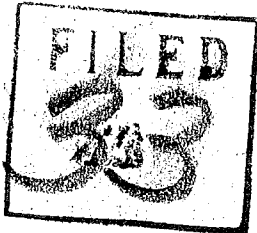
Very truly yours,

John M. Dalton
Attorney General

HPW/ld

INSURANCE:

Fully described Pre-Arranged Burial Agreement purportedly sold by McMikle Funeral Home, East Prairie or Charleston, Missouri, is a contract of insurance within language of Sec. 375.310 RSMo 1949.



August 1, 1955

Honorable Weber Gilmore
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Mr. Gilmore:

The following opinion is rendered in reply to your request reading as follows:

"The McMikle Funeral Home is selling throughout Southeast Missouri what is termed a Pre-arranged Burial Agreement. This office is familiar with several of the Attorney General's opinions heretofore issued by your office holding that burial agreements are insurance contracts unless the seller has complied with the insurance laws of the state. McMikle has no insurance license.

"I have obtained a typewritten draft of this insurance agreement which McMikle Funeral Home contends is not a violation of the law and have had cited me a copy of your opinion to Hon. C. Lawrence Leggett, Superintendent of the Division of Insurance dated September 15, 1954, regarding the Flora Hills Memorial Chapels, Inc. It has been pointed out to this office that the McMikle agreement does not fall into the category of insurance.

"Will you please advise this office if the enclosed contract is a contract of insurance within the meaning of the language contained in Sec. 375.310 R.S. Mo. 1949."

Provisions of the sample contract referred to in your letter quoted above are set out in full in order that no

Honorable Weber Gilmore

doubt will be entertained as to the contract provisions to which this opinion is addressed. We quote the sample contract in the following language:

"McMIKLE

"Pre-Arranged Burial Agreement

"I hereby request the McMikle Funeral Home, East Prairie, or Charleston, Missouri, to take charge of my body at the time of death, furnish all items incident to my burial, properly conduct my funeral, all in accordance with the pre-arranged Burial Agreement hereinafter set out, in the amount of \$250.00.

"In consideration of the hereinafter set out agreement, I hereby agree to pay the sum of \$250.00 in equal installments of \$1.00 per month on the first day of each month hereafter until said sum is fully paid. I further agree that should I fail to make such monthly payments by the 20th day of each month then this contract shall be void and of no effect and that there shall be no liability thereunder, all payments being made hereunder being forfeited as liquidated damages for the breach of this agreement.

"In consideration of the payment of \$1.00, and the payment of the sum of \$1.00 each month hereafter on the first day of each month after date hereof, the McMikle Funeral Home, East Prairie or Charleston, Missouri, agrees that in the event of the death of the undersigned, to take charge of and conduct the funeral of the undersigned, and furnish the following merchandise and services to the value of \$250.00:

1. Transporting body to preparation room.
2. Bathing the body.
3. Embalming the body.
4. Furnish casket and outside box.
5. Returning the body to family residence, if requested.

Honorable Weber Gilmore

6. Furnishing hearse service.
7. Use of funeral home and chapel.
8. Use of drape set and catafalque.
9. Use of folding chairs.
10. Furnish door badge.
11. Furnish death certificate and burial permit.
12. Furnish one family car.
13. Personal services.
14. Furnish evergreen.
15. Lowering device and grave tent.
16. Furnish grave marker.
17. Furnish flower racks.
18. Attend to flowers.
19. Furnish acknowledgement cards.
20. Attend to filing insurance claims.

"In the event that the deceased has died a distance in excess of 50 miles of East Prairie or Charleston, Missouri, or in the event the burial is to take place at a distance of more than 50 miles of East Prairie or Charleston, Missouri, in each instance a reasonable charge shall be made for distance traveled in excess of 50 miles.

"This agreement does not include cemetery lot, grave or opening of the grave; nor does it include the necessary clothing for the deceased.

"The McMikle Funeral Home agrees to furnish, free of extra charge, ambulance service within a radius of 50 miles of East Prairie or Charleston, Missouri, to the undersigned, said service not to exceed two trips during any one calendar year.

"All of the benefits and provisions of this agreement may inure to any member of the immediate family of the undersigned should such contingency arise, upon payment of the unpaid installments due under the contract.

"Nothing herein contained shall be construed as a policy of insurance whereby the McMikle Funeral Home agrees to pay any money under the terms of this agreement.

Honorable Weber Gilmore

"Dated at East Prairie or Charleston, Missouri,
this 1st day of May, 1955."

John Smith

Witness: Jim Jones

McMIKLE FUNERAL HOME

By Elgin McMikle "

Summarizing the essential provisions of the sample contract quoted above, we find that McMikle Funeral Home, through Elgin McMikle, agrees to furnish to the contract holder twenty specified services upon his death, with such services being valued at two hundred and fifty dollars; that the contract holder agrees to pay the said sum of two hundred and fifty dollars in monthly installments of one dollar per month, thus making the normal installment life of the contract cover a period of approximately twenty years; that the rendition of such services to the contract holder who has not defaulted in his monthly payments is unconditional, as evidenced by this particular language found in the contract:

"In consideration of the payment of \$1.00, and the payment of the sum of \$1.00 each month hereafter on the first day of each month after date hereof, the McMikle Funeral Home, East Prairie or Charleston, Missouri, agrees that in the event of the death of the undersigned, to take charge of and conduct the funeral of the undersigned, and furnish the following merchandise and services to the value of \$250.00: * * *";

that the contract does contain a provision in relation to its benefits which seeks to make the benefits of the contract provisions inure to any member of the contract holder's immediate family, such provision being as follows:

"All of the benefits and provisions of this agreement may inure to any member of the immediate family of the undersigned should such contingency arise, upon payment of the unpaid installments due under the contract."

Honorable Weber Gilmore

In the absence of purposeful fraud it is not reasonable to conclude that the provision just quoted, concerning the insuring of benefits to members of the contract holder's immediate family, was intended in any way to limit the direct promises made to the contract holder with reference to the services to be rendered. This being so, we have here a promise to render services of a designated value upon the death of the contract holder, with the promisor being relieved of his obligation only in the event of default by the contract holder in making his monthly payments of one dollar. Here we find the element of "risk" so essential to a contract of insurance. Should the contract holder die prior to making all payments to become due under the contract, that which he will receive in services will not necessarily bear any true relationship in money value to the agreed value in money of the services to be rendered, and such circumstance presents the tangible risk being insured under the contract. Having summarized the contract under review, we now refer to the applicable statute and case law.

Missouri statutes do not define a "contract of insurance." The essential elements of a contract of insurance are alluded to in the following language from State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, 1.c. 535:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Robers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury, (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay him a sum of money, or otherwise indemnify him.'"

Honorable Weber Gilmore

The insurance character of burial associations is evident from the following language found in Section 376.020 RSMo 1949, of Missouri's regular life insurance company law:

"* * * provided, that any association consisting of not more than one thousand five hundred citizens, resident of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

In 44 C.J.S., Insurance, Sec. 48, p. 494, we find burial insurance referred to in the following language:

"Burial insurance is a contract based on a legal consideration whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum."

The foregoing citation disclosing a definition of burial insurance bears remarkable likeness to the following definition found in 1 Joyce on Insurance (2 Ed), p. 87:

"Burial insurance is a contract based upon a legal consideration, whereby the obligor undertakes to furnish the obligee, or one of the latter's near relatives, at death, a burial reasonably worth a fixed sum. It is a valid contract, and constitutes life insurance."

In 1 Couch on Insurance, Section 32, burial insurance is referred to in the following language:

Honorable Weber Gilmore

"Burial or funeral benefit insurance is valid, and being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance."

CONCLUSION

It is the opinion of this office that the Pre-Arranged Burial Agreement described in this opinion, and purportedly issued by the McMikle Funeral Home, East Prairie, or Charleston, Missouri, is a contract of insurance within the meaning of language contained in Sec. 375.310 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:gm

INSURANCE:
BURIAL AGREEMENTS:

Fully described Pre-Arranged Burial Agreement is not an insurance contract within language of Section 375.310, RSMo 1949.

FILED
33

September 29, 1955

Honorable Weber Gilmore
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Sir:

This opinion construes the McMickle Pre-Arranged Burial Agreement, enclosed in your recent request for a formal opinion, with a view to determining if the same is an insurance contract being issued in violation of Section 375.310 RSMo 1949, which statute prohibits unauthorized persons or corporations from transacting an insurance business in Missouri. Provisions of the contract you submitted are set out in full in order that no doubt will be entertained as to the contract provisions to which this opinion is addressed. We quote the contract in the following language:

"McMICKLE

"Pre-Arranged Burial Agreement

"I hereby request the McMickle Funeral Home, East Prairie, or Charleston, Missouri, to take charge of my body at the time of death, furnish all items incident to my burial, properly conduct my funeral, all in accordance with the pre-arranged Burial Agreement hereinafter set out, in the amount of \$250.00.

"In consideration of the hereinafter set out agreement, I hereby agree to pay the sum of \$250.00 in equal installments of \$1.00 per

Honorable Weber Gilmore

month on the first day of each month hereafter until said sum is fully paid. I further agree that should I fail to make such monthly payments by the 10th day of each month then this contract shall be void and of no effect and that there shall be no liability thereunder, all payments being made hereunder being forfeited as liquidated damages for the breach of this agreement.

"In consideration of the payment of \$1.00, and the payment of the sum of \$1.00 each month hereafter, the McMikle Funeral Home, East Prairie or Charleston, Missouri, agrees in the event of the death of the undersigned and in the event of full compliance with the terms of this agreement and provided that undersigned has paid the amount due provided for herein, to take charge of and conduct the funeral of the undersigned, and furnish the following merchandise and services to the value of \$250.00:

1. Transporting body to preparation room.
2. Bathing the body.
3. Embalming the body.
4. Furnish casket and outside box.
5. Returning the body to family residence, if requested.
6. Furnishing hearse service.
7. Use of funeral home and chapel.
8. Use of drape set and catafalque.
9. Use of folding chairs.
10. Furnish door badge.
11. Furnish death certificate and burial permit.
12. Furnish one family car.
13. Personal services.
14. Furnish evergreen.
15. Lowering device and grave tent.
16. Furnish grave marker.
17. Furnish flower racks.
18. Attend to flowers.
19. Furnish acknowledgement cards.
20. Attend to filing insurance claims.

Honorable Weber Gilmore

"In the event that the deceased has died a distance in excess of 50 miles of East Prairie or Charleston, Missouri, or in the event the burial is to take place at a distance of more than 50 miles of East Prairie or Charleston, Missouri, in each instance a reasonable charge shall be made for distance traveled in excess of 50 miles.

"This agreement does not include cemetery lot, grave or opening of the grave; nor does it include the necessary clothing for the deceased.

"The McMikle Funeral Home agrees to furnish, free of extra charge, ambulance service within a radius of 50 miles of East Prairie or Charleston, Missouri, to the undersigned, said service not to exceed two trips during any one calendar year.

"All of the benefits and provisions of this agreement may inure to any member of the immediate family of the undersigned should such contingency arise, upon payment of the unpaid installments due under the contract. In no event will the above services be rendered to the holder of this contract or to members of the immediate family unless the total consideration provided for herein shall have been fully paid.

"Nothing herein contained shall be construed as a policy of insurance whereby the McMikle Funeral Home agrees to pay any money under the terms of this agreement.

"Dated at East Prairie, or Charleston, Missouri, this _____ day of _____, 195__.

Witness

McMIKLE FUNERAL HOME

BY _____."

Honorable Weber Gilmore

Enclosed is a copy of an opinion issued by this office under date of August 1, 1955, construing an agreement with provisions almost identical to those contained in the agreement quoted above. The essential differences may be pointed out by setting out paragraphs three and seven of the above quoted agreement and underscoring the two new provisions which have been added, and inserting parenthetically the language deleted from the third paragraph as it appeared in the agreement construed on August 1, 1955.

The third paragraph of the agreement being construed provides, in part, as follows:

"In consideration of the payment of \$1.00, and the payment of the sum of \$1.00 each month hereafter (on the first day of each month after date hereof), the McMikle Funeral Home, East Prairie or Charleston, Missouri, agrees in the event of the death of the undersigned and in the event of full compliance with the terms of this agreement and provided that undersigned has paid the amount due provided for herein, to take charge of and conduct the funeral of the undersigned, and furnish the following merchandise and services to the value of \$250.00: * * *" (Emphasis and parentheses supplied.)

The seventh paragraph of the agreement being construed provides as follows:

"All of the benefits and provisions of this agreement may inure to any member of the immediate family of the undersigned should such contingency arise, upon payment of the unpaid installments due under the contract. In no event will the above services be rendered to the holder of this contract or to members of the immediate family unless the total consideration provided for herein shall have been fully paid." (Emphasis supplied.)

Honorable Weber Gilmore

In our opinion of August 1, 1955, heretofore referred to, we ruled that the rendition of services to the contract holder who had not defaulted in his monthly payments was unconditional, thereby establishing the element of "risk" so essential to an insurance contract. However, an additional clause has been added to paragraph seven of the contract now being construed which provides as follows:

"In no event will the above services be rendered to the holder of this contract or to members of the immediate family unless the total consideration provided for herein shall have been fully paid."

We construe the term "total consideration" as used in the above quoted provision from paragraph seven of the agreement to refer to the full value of services to be rendered to the value of \$250.00, and not to the consideration measured by installment payments made by the holder of the contract at the time of his death. Consequently, under the agreement being construed the contract holder, as well as those members of his immediate family who would choose to have the benefits of this agreement inure to them, must meet the full cost of the services to be rendered up to the value of \$250.00. Under the clause referred to and now appearing in the seventh paragraph of the agreement being construed, no "risk" whatever is being assumed by the McMikle Funeral Home by which it might be compelled, by the uncertainty of life or economic condition of the contract holder, to render services at a cost disproportionate to the value of such services to the amount of \$250.00. As written, the agreement is nothing more than a promise to the contract holder that he, or members of his immediate family, may look to McMikle Funeral Home for funeral services to the value of \$250.00 upon the death of the contract holder, on condition that the full value of such services be paid.

CONCLUSION

It is the opinion of this office that the Pre-Arranged Burial Agreement described in this opinion is not an insurance contract and issuance of the same is not a violation of Section 375.310 RSMo 1949.

Honorable Weber Gilmore

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

SENATE BILL 297:
VOTER REGISTRATION:
REGISTRATION:
REGISTRATION LIST:
VOTERS:
QUALIFIED VOTERS:
ELECTIONS:



The county must bear any expense necessary to carry out Senate Bill No. 297, 68th General Assembly; the county is the interpreter of its effect and applicability; and signature lists prepared in accordance with Section 114.100, RSMo 1949, may still be used to check the signature of voters.

November 14, 1955

Honorable Weber Gilmore
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion of this department, which request reads as follows:

"I suppose by now you and your office are tired of hearing about the above referenced Bill (Senate Bill 297). I note that by your Report and Digest of Opinions several inquiries have come into your office regarding this Bill, but none of them have quite answered all the questions that the County Court of Scott County have asked me.

"As you know, the City of Sikeston comes under the provisions of Senate Bill 297 and consequently comes under the provisions of Chapter 116 R.S.Mo. 1949. Also, as you know, the county seat is at Benton, Missouri.

"I would appreciate it very much if you could give me an opinion as to the following:

"1. In the case of a re-registration of voters in the City of Sikeston, Missouri, wherein said records are utilized by the city in special city elections, as well as by the county and state in other elections:

"a. Who purchases the supplies necessary to accomplish the re-registration, i.e., are there any provisions for the city to contribute?

Honorable Weber Gilmore

"b. Is the city or the county liable for the salaries of these people performing the physical labor at the office of the city clerk? Should this be a responsibility of the city clerk's office when the county clerk's office is not located in that city, i.e., is the county clerk required to hire deputy clerks to work in the city clerk's office to perform this function?

"c. During those periods of time other than when a re-registration program is under way, who is responsible for providing personnel at the city clerk's office to take care of the normal registering of voters moving into the city?

"2. Should a situation occur where the county court did not feel that a re-registration was necessary, but the city officials felt that one was needed, who would be responsible for this re-registration?

"3. Under the provisions of Section 116.130 R.S.Mo. 1949 those voters registered prior to July 1 do not have to re-register. In this case, how are the other provisions of this section complied with which makes it compulsory that the signatures of those voters re-registering, or voting, be checked against the signature cards they are required to sign?

"I would appreciate your opinion at your earliest convenience."

I.

Senate Bill 297 states, in part:

"There shall be a registration of qualified voters under the provisions of this chapter in every city containing at least ten thousand inhabitants located in any county not having a provision for registration of voters. The registration shall be held at the office of the county clerk except in cities in which the county clerk has no office where the registration shall be held in the office of the city clerk who shall be furnished with the necessary supplies.* * *"

Honorable Weber Gilmore

The answers to the questions you raise are not, thus, covered specifically by the bill. It is our view, however, that Senate Bill 297 does not change the previous requirement that the county furnish necessary supplies to handle the registration of voters. Senate Bill 297 was intended only to make uniform the registration procedure in cities where formerly three different chapters governed. Since registration has been left a matter of county control, the county should bear whatever expense is required to handle the task.

II.

In answer to your second question, reregistration under Senate Bill 297 is required only of those voters (registered prior to July 1, 1955) to whom Sections 116.070 and 116.080, RSMo 1949, are applicable. These sections provide, respectively, for the reregistration of persons who change their name or address within the city and the reregistration of voters who did not vote in the previous two general elections. Any conflict of interpretation between county and city officials in this regard should be resolved in favor of the county. Section 116.030, Cum. Supp. 1953, states specifically that "The county clerk of such county shall be in charge of such general registration and all other registrations provided for by this chapter."

III.

In accordance with Section 114.100, RSMo 1949, formerly applicable, Sikeston's Board of Registrars has a permanent record of voters carrying the signature of each individual voter. This record may still be used to check the signature of any voter.

CONCLUSION

It is, therefore, the opinion of this office that the county must bear any expense necessary to carry out Senate Bill 297, 68th General Assembly; that the county is the interpreter of its effect and applicability; and that signature lists prepared in accordance with Section 114.100, RSMo 1949, may still be used to check the signature of voters.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walker La Brunerie, Jr.

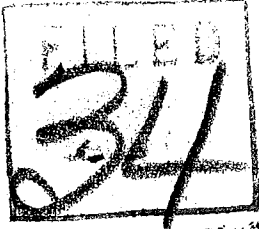
Yours very truly,

John M. Dalton
Attorney General

WLaB:vlw:hw

SAVINGS AND LOAN ASSOCIATIONS:
VOLUNTARY DISSOLUTION:
CUSTODY OF RECORDS:

When a savings and loan association is voluntarily dissolved and liquidated in accordance with Sections 369.465, 369.470 and 369.475 RSMo 1949, and during liquidation a director is given custody of records, that after liquidation is completed and association is legally non-existent, director not required to retain possession of records any longer.



September 15, 1955

Honorable Morris G. Gordon
Supervisor, Savings and Loan Supervision
Jefferson City, Missouri

Dear Mr. Gordon:

We are in receipt of your recent request for a legal opinion of this department upon the inquiry presented in the letter attached to your request and which reads in part as follows:

"I am a former director of Nickle Savings Investment & Building Association which was liquidated some years ago. The last payment to our clients was made in June, 1949, and I would like to have your instructions as to whether it is necessary for me to keep the records of this liquidated association any longer."

We requested further information regarding the facts relating to the above request and the reply to our request reads in part as follows:

"(1) The association was dissolved by action of unanimous vote of Board of Directors.

"(2) No proceedings in court on account of this dissolution.

"(3) I cannot locate certificate from supervisor. However, we made no move without consent of supervisor. The Director of Savings & Loan Office must have this record.

"(4) No proceedings.

"(5) If after six years without comment and criticism of any kind by stockholders who were paid the book value of their stock in full plus

Honorable Morris G. Gordon

their proportion of a substantial surplus, I feel it is not necessary to hold records any longer.

"These records are in the basement of my home and, as I stated before, if they are no longer needed, I see no reason why they should clutter up my home. I might also add that the only court proceeding was caused by a former stockholder who attempted to regain two pieces of property after giving our association a quick claim deed 18 years prior to dissolution. This case was tried in Circuit Court at Clayton, Missouri before Judge John Whithouse and decided in favor of our association. His decision was appealed to the State Supreme Court who upheld the decision of a lower court."

From the correspondence before us it appears that the Nickel Savings Investment and Building Association of St. Louis, Missouri was dissolved by voluntary action of its board of directors, and that the liquidation and winding up of its affairs was completed in June 1949.

The writer of the letters quoted above was director of the association and as such had charge of the records during the liquidation and to the present time. We construe his inquiry to be, is it his duty to retain possession of said records for the benefit of the association any longer. In our discussion herein we are passing upon the necessity of the director to keep the records as required by state law and not the desirability of keeping said records for his personal protection or the protection of others.

Sections 369.465, 369.470 and 369.475 RSMo 1949, set out the statutory procedure for the voluntary dissolution and liquidation of a savings and loan association.

For the purposes of our discussion it will be assumed that these statutes have been fully complied with by the Nickel Savings Investment and Building Association, that such association has been legally dissolved, and that the association has been legally non-existent since June 1949.

In this connection we call your attention to the legal effect of the dissolution of a corporation as it was discussed by the court in the case of State ex rel. McDowell v. Libby, 238 Mo. App. 36. At l.c. 42 and 43 the court said:

Honorable Morris G. Gordon

"* * * The dissolution of a corporation is the termination of its corporate existence and its extinction as an entity or body. At the common law the property of a dissolved corporation escheated to the Crown and all debts due to or from it were extinguished, and all pending suits and actions by and against it were abated. Unless there is a statute to the contrary, a judgment cannot be rendered against a dissolved corporation. Such a judgment is void.

"To obviate the harshness and effect of the common law a great number of states, including our own, have enacted statutes providing that the directors and president or manager of a dissolved corporation shall become its trustees for the purposes specified in such statutes. (See Secs. 5036, 5094, R.S. Mo. 1939.) These statutes were designed for the purpose of providing the machinery by which actions may be continued against dissolved corporations and to prevent the abatement of actions by reason of the corporation's dissolution. They provide that the named officers are and become trustees of the corporation upon its dissolution and, as such, are its legal representatives. It follows that upon the dissolution of the corporation the trustees became proper and necessary parties to the proceedings and in this case it was necessary to substitute such trustees for the corporation, and parties defendant, in order that the actions might have proceeded. They could no longer be maintained in the name of the dissolved corporation and the judgments rendered against it were void.* * *"

It is believed that Section 369.470, belongs to that class of statutes to which the court referred in the above quoted opinion. However, said section is applicable only to the dissolution and liquidation of savings and loan corporations.

Ordinarily the dissolution ends the existence of a corporation, after which it is unauthorized to exercise any of the powers conferred upon it by law or its charter, unless some statute authorizes it to continue its existence and to exercise certain powers for a limited time only for the purposes provided in said statute.

Honorable Morris G. Gordon

Section 369.470, is a statute which authorizes the continued existence of an association and the exercise of such powers as may be necessary for liquidation purposes. Said section also provides that the board of directors shall be trustees in charge of the association's property for such liquidation purposes and what their duties shall be.

Incidental to the performance of the duties specified in said section, is the keeping of records of business transactions and of the financial affairs of the association. Section 369.475 requires the board to render a report and financial accounting at the completion of the liquidation and dissolution of the association, which must be approved by the supervisor.

While we have not been fully advised, we assume that the records of the association referred to in the opinion request are of the kind mentioned in Sections 369.470 and 369.475.

We further assume that the records were in the possession of the writer of the opinion request for the purpose of making the necessary entries during the liquidation period and that such records have been in the possession of the director from such time to the present, and that he now desires to part with possession and have the records removed from the basement of his home where they have been stored.

It was the legal duty of such director-trustee to have possession and make the necessary entries in the records committed to his charge until the affairs of the savings and loan association had been wound up.

The records in question belong to the association and are not public records required to be kept by the supervisor of savings and loan, as no statute requires the supervisor to keep the records of a dissolved association. This principle was held to be the law in a legal opinion of this department furnished to the Honorable T. Victor Jeffries, Supervisor, Bureau of Building and Loan Supervision, Jefferson City, Missouri, upon July 14, 1943. A copy of such opinion is enclosed for your consideration.

After the Nickel Savings Investment and Building Association was dissolved, liquidation proceedings finally completed, and approved by the supervisor of Savings and Loan Supervision, said association was legally non-existent from that time.

The board of directors as officers and trustees of the association lost their status as such at the same time and, of course, were not required to perform any of their former official

Honorable Morris G. Gordon

duties any longer. This being true, the director referred to in the opinion request is not required to make entries in the records of the association after such liquidation, nor is he required to have the physical possession of said records any longer.

CONCLUSION

It is the opinion of this department that when a savings and loan association is voluntarily dissolved by action of its board of directors and is liquidated in accordance with the provisions of Sections 369.465, 369.470 and 369.475 RSMo 1949, and during the liquidation period one of the directors is given custody of the association's records, that after the liquidation process has been completed and the association becomes legally non-existent, said director is not required to retain possession of such records any longer.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

Enclosure - T. Victor Jeffries
7-14-43

PNC:ma,ld,vlw

SAVINGS AND LOAN ASSOCIATION:
MINOR SHAREHOLDERS MAY MAKE
VALID CONTRACT WITH ASSOCIA-
TION, WHEN:

) Under provisions of Sections 369.150
) and 369.155, Laws of Missouri 1953,
) page 229, minor's agreement to surren-
) der certificates of shares upon pay-
) ment to him of cash value, his receipt
) and release of liability to the

association is valid when it clearly appears minor understands contract. When fully executed by parties, minor cannot subsequently avoid contract during minority or upon reaching majority and bring action to recover shares or their value. 2) Savings and loan association cannot reissue certificates of shares of minor in name of person other than the minor, or in names of minor and another. 3) Said sections do not authorize minor to contract for assignment, transfer and delivery of his certificates of shares with any party other than issuing association, and contract for assignment not with association may be avoided during minority or upon reaching majority, and minor may bring action to recover shares or their value.

FILED

34

October 24, 1955

Honorable Morris G. Gordon
Supervisor
Division of Savings and Loan Supervision
Jefferson Building
Jefferson City, Missouri

Dear Mr. Gordon:

This department is in receipt of your recent request for a legal opinion of this department which reads, in part, as follows:

"Mrs. Mildred Dale, a widow, was the owner of a certificate for five shares of stock in the Shelbina Building and Loan Association, valued at \$500.00. Subsequently she remarried and some time after her remarriage she brought her certificate to the Secretary of the Association and requested him to issue a new certificate for the same number of shares payable to Mildred Dale Weaver or Robert William Collins. At the time of the reissue she told the Secretary that in the event of her death Robert William Collins was to be the absolute owner.

"Recently Mrs. Weaver died leaving surviving her her husband, but no issue or descendants. No administration is being had upon the estate.

Honorable Morris G. Gordon

"It now develops that Robert William Collins was her nephew and is a minor of the age of five years. Section 369.155, revised statutes of Missouri as amended says that the minor can cash the certificate, receive the money, and his receipt or acquittance shall be a valid and sufficient release and discharge of the Association for any payment so made. The minor has no guardian.

"If the Association took up his certificate, paid him and took his receipt, and subsequently he lost the fund himself or through others, do you think the receipt would be a valid release if he brought suit after he arrived at the age of 21?

"Suppose he came to the Secretary, brought his certificate, and asked the Association to issue a new certificate to someone else or to himself and someone else, do you think he can do it? Do you think he could assign, transfer and deliver the certificate to any other person?

****."

From the above statement of facts it appears that the first inquiry is whether or not a minor, who owns shares of stock in a savings and loan association, can legally surrender his stock to said association and, upon being paid the cash value of the stock, give a valid receipt and release to the association so that upon reaching twenty-one years of age such minor will be precluded from avoiding his contract and bringing a suit to recover the stock or its value.

It appears that the second question inquires whether or not a minor can legally surrender his certificate of stock to a savings and loan association and have a new one issued in the name of a person other than himself, or in his own name and that of another person, and also if he can legally assign, transfer and deliver his certificate to any other person.

Before entering into our discussion we call attention to Section 457.010, RSMo 1949, which provides who shall be considered minors in Missouri. Said section reads as follows:

Honorable Morris G. Gordon

"All persons of the age of twenty-one years shall be considered of full age for all purposes, except as otherwise provided by law, and until that age is attained they shall be considered minors."

Since both inquiries of the opinion request involve the power of a minor to enter into a contract under the particular circumstances referred to, it is believed proper to refer to the general rule prevailing in Missouri and most jurisdictions in regard to a minor's capacity to contract. The general rule has been given in Volume 43, C.J.S., Page 162, and is as follows:

"The general rule, * * * is that, with certain exceptions, as in the case of contracts for necessities, * * * and those entered into in the performance of a legal duty, and in some special cases of actual and active fraud, the contracts of an infant, whether executed or executory, are voidable, and such contracts of an infant are voidable at his election or option after attaining his majority, and not void, in the absence of a statute providing otherwise. In this connection it has been said that one deals with an infant at his peril, particularly when doing so with knowledge of his incapacity."

This rule, such as other general rules, has exceptions, and it appears that one of the exceptions is that contracts of minors authorized by statute are not voidable by the minor but are legally binding.

Sections 369.150 and 369.155, Laws of Missouri, 1953, page 229, are statutes regulating the issuance of membership certificates to joint account holders of savings and loan associations, and also regulate the issuance of membership certificates to minors. It is our thought that the latter section is an exception to the general rule, and such contracts of minors are not voidable for reasons to be presently noted.

Section 369.150 reads as follows:

"1. An association may issue membership certificates in the name of two or more persons, whether minor or adult, and in form to be paid to any one or more of them, or the survivor or survivors of them.

Honorable Morris G. Gordon

"2. Such account, and any additions made thereto by any of them, shall become the property of such persons as joint tenants and shall be held for the exclusive use of the persons so named therein, or the survivor or survivors of them.

"3. And such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said association, whether any one or more of the persons named be living or dead, for all payments so made by the association on such account prior to the acknowledgment of receipt by, or service by an officer empowered to make service of process upon, said association at its home office of notice in writing signed by any one of such joint tenants not to pay such account in accordance with the terms thereof.

"4. If there are more than two persons named in such membership certificate and one of such persons dies, the account represented by such certificate shall become the property of the survivors as joint tenants. Such a joint account shall create a single membership in an association."

Section 369.155 reads as follows:

"An association may issue membership certificates to minors. Such an account shall be held for the exclusive right and benefit of such minor, free from the control or lien of all persons. Payment to, and the receipt or acquittance of such minor shall be a valid and sufficient release and discharge of the association for any payment so made; provided further, that in the event of the death of such minor the receipt or acquittance of either parent or of a person standing in loco parentis to such minor shall be a valid and sufficient release and discharge of the association for any sum or sums not exceeding in the aggregate five hundred dollars unless the minor shall give written notice to the association not to accept the signature of such parent or person."

Honorable Morris G. Gordon

The former section is basically the same as Section 8257.55, R.S. Mo. 1939, Laws of 1945, p. 1578, sec. 56, regarding the joint ownership of savings and loan certificates. In the case of Weber v. Jones, 222 S.W. (2d) 957, at l.c. 959, the court held that no case had been cited and none had been found construing Section 8257.55, R.S. Mo. 1939, but that similar statutes relating to banks and trust companies had been construed. The court also held that while accounts opened according to the provisions of the banking statutes are presumptively joint accounts, and the successor takes as a joint tenant, this is a rebuttable presumption and it may be shown that such was not the intention of the depositors.

From the holding in the above-mentioned case, we believe that such similar banking and trust company laws would, in the absence of any cases construing Sections 369.150 and 369.155, supra, (and we find none) be helpful in construing said sections, and we shall refer to any statutes or decisions construing the banking laws as may be necessary in the course of our discussion.

The case of Phillips v. The Savings Trust Company, 231 Mo. App., 1178, involved the statutes regarding banks and trust companies. This was an action to establish a bank balance of twelve dollars belonging to plaintiff, as a preferred claim against defendant, The Savings Trust Company of St. Louis, which trust company was in charge of the commissioner of finance for the purpose of liquidation. Plaintiff's petition alleged that he was a minor and that his claim was based upon deposits of money made by him in said Savings Trust Company, which company had knowledge of plaintiff's minority at such time. From an adverse ruling of the circuit court plaintiff appealed to the St. Louis Court of Appeals, where the judgment of the lower court was affirmed.

In passing upon the general rule prevailing with reference to the validity of contracts entered into by minors, as the rule applied to facts involved in the case, the court said, l.c. 1184, 1185:

"It is settled law that a minor is not absolutely incapable of contracting in the sense that his contract is absolutely void, but his contract is voidable only, which means that the minor has a right to disaffirm the contract at any time during his minority or within a reasonable time after attaining his majority.

"But the disaffirmance of a contract made by a minor nullifies it and renders it void ab

Honorable Morris G. Gordon

initio. (Hamlin v. Hawkins (Mo.) 61 S.W. (2d) 348, 1.c. 350; 31 O.J. 1060, 1071.)
The rule, however, has its exceptions and limitations.

"In Pannell v. St. Louis-San Francisco Ry. Co. (Mo.), 263 S.W. 182, involving a contract respecting a pass issued by defendant to plaintiff, who was a minor, the court said:

" 'It seems to follow, therefore, as a legitimate conclusion from the facts in this case that the use of this pass by the deceased cannot be otherwise construed than as a benefit. As such it may be included in the constantly widening category of contracts which when made by an infant are as valid and binding as if he were of full age.'

"The text of 31 Corpus Juris, at page 1012, reads as follows:

" 'Where an infant is in absolute and lawful possession of money as his own property, he has a right to deposit it in any place for safe-keeping, as in a bank, and he has a right to reclaim it at any time, although he is yet a minor, and the person or institution so paying it to him assumes no risk in so doing.'

"In Smalley v. Central Trust & Savings Co., 72 Ind. App. 296, plaintiff, who was a minor, was in possession of \$1600, which was her own money. She deposited the money with the defendant subject to check. At the same time defendant furnished her with a pass book showing the deposit duly credited therein, and furnished her with blank checks to use in checking against her deposit. Afterwards, plaintiff, while yet a minor, checked the deposit out. Subsequently, plaintiff on attaining her majority sued defendant for the amount of her deposits. From a judgment against her plaintiff appealed. In disposing of the appeal, the court, after stating that the record did not disclose whence appellant had received the money, said:

"From whatever source it was received, it was her own property, and under her own control. What should she have done with it? Should she have kept it on her person and dealt it out from time to time as necessity required, or should she have deposited it in a reputable banking institution until she required it? All are ready to say that this latter course was the sensible one for her to pursue. But, if appellant's contention is correct, she could not so deposit her money, except at the risk of the bank refusing to repay it to her, until she is twenty-one years of age, and the bank would have been fully justified in so refusing for any payment to her or to her order would have been at its peril. It would have assumed the risk that at her majority she would disaffirm the payment, and demand her money again. It is the common practice of banking institutions to accept the deposit of minors, sometimes of children, of their earnings, for Christmas saving, or for the purpose of accumulating for some other definite purpose, or as a means of training such depositors in habits of frugality. But if such deposits cannot be repaid to the minor depositors until they have reached their majority, then such banking business must of necessity end, for the banks cannot afford to assume the risk. Appellant must fail in her contention. We hold that when appellant deposited her money in appellee's bank, as she had a lawful right to do, the relation of debtor and creditor between the appellee and appellant was created, that appellant had a right to her money again, that it was the duty of appellee to restore it to her, upon a proper check or demand, and that the bank assumed no liability in so doing. (Hobbs v. Godlove (1861), 17 Ind. 359, 362.) We do not by this decision disturb the general rules of law as to the validity of contracts of minors. We do hold, however, that where a minor is in absolute and lawful possession of money as her own property, whether from the proceeds of settlement with her guardian, as compensation for services rendered, or from any other lawful source, puts it in a bank, or other place of safe keeping, rather than to carry it on her person, she has a right to reclaim it at any time, even though she is yet a minor, and the person or institution so paying it to her assumes no risk in so doing."

Honorable Morris G. Gordon

From the ruling of the court given in that portion of the opinion quoted above, it is apparent that the statute authorizing minors to deposit their money in banks and to withdraw it without the guidance or direction of any adult person is to be considered as one of the exceptions to the general rule, and that such contracts of minors are binding. The ruling has the practical effect of construing Section 5465 R. S. No. 1929, as placing minors on the same footing as adults with respect to bank deposits made by them.

From the language used in Sections 369.150 and 369.155, supra, and in view of the holding of Phillips v. The Savings Trust Company, supra, it is believed to be the legislative intent, in the enactment of said sections, that the issuance of membership certificates by savings and loan associations to minors and the ownership of said certificates by minors is to be in the same manner as such transactions are carried on between the associations and adults.

Section 369.155, supra, specifically authorizes an association to issue membership certificates to a minor as sole and absolute owner of the account, to be held for the exclusive right and benefit of the minor and free from the lien or control of all persons. The section further provides the minor may surrender his certificates, and that the acquittance of his account, the payment to him of the value of his shares, and his receipt of that amount shall be a valid and sufficient release and discharge of the association for the payment made by it.

From a casual reading of Section 369.155, supra, it would appear that when a savings and loan association is presented with certificates of shares in the association by the minor owner for surrender, the association shall accept them and pay the owner the cash value. By taking the minor's receipt for such payment, together with his release of liability of the association it would further appear that in the event the minor subsequently changed his mind regarding the transaction, he would be legally estopped from suing the association for the certificates or their value at any time during his minority or within a reasonable time after reaching his majority. However, it is our contention that a casual reading does not disclose the true meaning of the section, for said section is not believed to contain any such provisions. It is further believed not to have been the legislative intent to enact, and that they did not enact a law of this nature, which in effect, abolishes all restrictions and protections heretofore placed about minors with reference to the validity of their contracts.q

While the section does not expressly set out certain restrictions, yet, it is evident they are implied from the language used, and must be followed as closely as if they had been stated in so many words. To consider the statute in any other manner would lead to absurd and ridiculous results. For example, if construed in the latter manner it would be permissible for a child of tender

Honorable Morris G. Gordon

years to present his certificates, or rather when a very young child and his certificates were presented to the association by his parent, with the parent's statement that the child wanted to surrender his certificates and receive the cash value of same, it would be the duty of the association to accept the certificates and pay the money on them as requested, regardless of the fact the owner was too young to sign his name or of insufficient intellect to appreciate the legal effect of the transaction. Undoubtedly, such a loose construction of the law would open the door to unscrupulous persons to practice all kinds of fraud upon minor certificate holders.

Fortunately, the statute does not abolish all restrictions, and there is no likelihood of any unpleasant occurrences similar to those mentioned above coming to pass, to the detriment of both the minor and the association in which he owns shares. The implication is that an association is required to first ascertain as best it can, if the minor is of sufficient age and intellect to understand and does understand the nature of the contract into which he is about to enter. After having fully satisfied itself of these facts the association may then safely accept the certificate surrendered, pay the minor the value of same and receive the minor's receipt and discharge of liability. Under these circumstances it would appear that the contract between the minor and the association is binding and cannot be set aside in the event the minor subsequently changes his mind during his minority, or within a reasonable time after reaching his majority and bring suit to recover the certificates or their value.

In support of our contention we call attention to the case of *McCarty v. North River Saving Bank*, 296 New York State at page 298, construing certain sections of the New York Banking Statutes and their legality in regard to the payment by a bank of a deposit to a minor. The court upheld the legality of the payment but had something to say about the responsibility of a bank which pays money to an infant of such tender years as to be non sui juris. At l.c. 299 the court said:

"We think it was the intention of the legislature that subdivisions 1 and 2 of section 249 of the Banking Law, as they existed in 1928, should be read together so as to permit payment to be made to an infant by a savings bank of a trust deposit. The amendment of 1936 to subdivision 2 (chapter 561 of the Laws of 1936) merely clarified the existing law. Without passing upon the responsibility of a savings bank which pays money to an infant of such tender years as to be non sui juris, we find no proof in the present record that this infant lacked capacity

Honorable Morris G. Gordon

to understand the transaction. Therefore, the bank was protected by the statute in giving the check to the plaintiff."

In view of the holding in this case and for the reasons given above, and also bearing in mind the restrictions and qualifications to which attention has been previously called our answer to the first inquiry is in the affirmative.

In considering the first part of the second inquiry, that when a minor presents his certificates of shares to an association and requests new ones to be issued in the name of a person other than the minor, or in the name of the minor and another person, if the association is authorized to comply with the request, we again call attention to Section 369.155, supra, and quote the following portion of same:

"An association may issue membership certificates to minors. Such an account shall be held for the exclusive right and benefit of such minor, free from the control or lien of all persons.
* * * *"

This is the only statutory authority for an association to issue certificates to minors, and it is silent as to the issuance of certificates to minors in the name of any other person or persons, or in the names of a minor and another person. Since the statute provides the minor's account is to be for his exclusive right and benefit, and free from the control or lien of all other persons, we understand it to mean that the certificates shall be issued only in the name of the minor depositor. In view of the provisions of the section quoted above, an association would be legally unauthorized and could not issue a certificate to a minor in the name of another person, or in the name of the minor and another person.

Therefore, our answer to the first part of the second inquiry is in the negative.

The second part of the second inquiry as to whether the minor can legally assign, transfer and deliver his certificate to another person, presents an entirely different situation than that presented in the former inquiries. By "any other person", as used in the last inquiry, we assume this to refer to someone other than the minor himself or the saving and loan association in which the minor holds a membership certificate.

Section 369.155, supra, makes the contract between a minor, and the association issuing the certificates to the minor binding, when but for this exception to the general rule, said contracts would be voidable at the minor's option. However, no provision

Honorable Morris G. Gordon

in this or any other section of the savings and loan statutes is found to the effect that contracts of assignment, transfer and delivery of a minor's certificates of shares in an association between the minor and "any other person" shall be valid, and not voidable by the minor. It is our thought that the general rule noted above fully applies to all contracts by which a minor assigns, transfers or delivers his savings and loan certificate to "any other person" and such contract would not be void, but voidable, if the minor chose to avoid it at any time during his minority, or within two years after reaching his majority.

Therefore, our answer to the second part of the second inquiry must be in the negative.

CONCLUSION

It is the opinion of this department that under the provisions of Sections 369.150 and 369.155, Laws of Missouri, 1953, page 227, that:

- 1) The agreement of a minor to surrender his certificates of shares in a savings and loan association, and upon payment to him of their cash value, to give his receipt therefor and release of liability to the association, is a valid contract in all those instances in which it clearly appears the minor fully understands the nature of the contract into which he enters. After having been fully executed by the parties thereto, said minor cannot subsequently avoid the contract during his minority, or within a reasonable time after reaching his majority and bring an action to recover the shares or their value.
- 2) A savings and loan association is legally unauthorized to reissue the certificates of a minor in the name of a person other than the minor, or in the names of the minor and that of another person.
- 3) The contract of a minor to assign, transfer and deliver his certificates of shares in a savings and loan association to any party other than the association issuing the certificates is not legally binding upon the minor. Without regard to whether the contract is executed or executory, said minor may, at any time during his minority, or within a reasonable time after reaching his majority, avoid the contract and bring an action to recover the shares or their value.

Honorable Morris G. Gordon

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC/ma,bi

STATE PARK BOARD: Missouri State Park Board is authorized
CONSTITUTION: to lease land for state park purposes.
TITLE:



January 19, 1955

Missouri State Park Board
P. O. Box 176
Jefferson City, Missouri

Attention: Abner Gwinn, Director

Gentlemen:

This will acknowledge receipt of your recent request for an opinion as to whether the State Park Board may accept an area on the Wappapello Reservoir for state park purposes when the title to said land remains in the federal government and all that the state may acquire is a fifty-year lease with the option of an additional fifty-year term, upon expiration thereof.

Under Chapter 253, Missouri Revised Statutes Cumulative Supplement, 1953, and especially Section 253.040 thereof, the present Missouri State Park Board is given much broader powers than its predecessor in office. The old State Park Board, under Section 253.020, Revised Statutes of Missouri, 1949, was not vested with such specific and broad powers, but only with the power to acquire and operate land for state park purposes. The law at that time provided that said board may acquire by purchase, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the State Park Board. The act creating the new State Park Board, namely, Chapter 253, Missouri Revised Statutes Cumulative Supplement, 1953, authorizes said board to accept or acquire by purchase, lease, donation, agreement or eminent domain, any lands, or rights in lands, sites, objects or facilities which in its opinion should be held, preserved, improved and maintained for park or parkway purposes. The board is further authorized to improve, maintain, operate and regulate any such land, sites,

Missouri State Park Board

objects or facilities when such action would promote the park program and general welfare.

In view of the new State Park Act hereinabove referred to there can be no question but that the leasing of this land would be for a public purpose and apparently, the Missouri State Park Board deems that it would promote the park program and general welfare.

CONCLUSION

Therefore, it is the opinion of this department that the Missouri State Park Board may accept said area under a fifty-year lease with an option for a renewal of an additional fifty-year term.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:vlw

ANNEXATION: Order of the county court of Oregon County made February 7, 1927, did effect the annexation of Standley's Second Addition to the Village of Koshkonong.



March 23, 1955

Honorable Percy W. Gullie
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

Your recent (February 17, 1955) request for an official opinion sets forth the various acts taken relative to the attempted annexation of Standley's Second Addition to the town of Koshkonong, in Oregon County. The issue which you present is whether the acts done did effect an annexation. We have taken note of the first, second, and third orders of the county court in regard to this matter. We do not feel that it is necessary for us to attempt to decide the effect of these first three orders in order for us to reach a decision upon this matter, inasmuch as we believe that the fourth and last order, entered on February 7, 1927, did effect such an annexation. That order, as set forth by you, reads as follows:

"STANDLEY'S SECOND ADDITION, ADDED TO
THE VILLAGE OF KOSHKONONG

"Be it remembered that a petition heretofore filed by the Board of Trustees of the Village of Koshkonong, asking the Court to add to the Corporate Village of Koshkonong a certain addition to-wit: Stanley's Second Addition as therein stated, and after due consideration of the premises and hearing such evidence as was offered by said Board, it is therefore ordered and adjudged by the

Honorable Percy W. Gullie

Court that the following addition to-wit: Stanley's Second Addition be added and annexed to the original Corporation of the Village and is hereby included in the incorporated limits of the Village of Koshkonong and shall hereafter be a part of the original incorporation and entitled to all the privileges thereto pertaining to said incorporation, Said Second Addition being described as follows to-wit:

"Commencing at the center of Section 5, Township 22, Range 6, Oregon County, Missouri, run thence East 490 feet, thence South 1290 feet to right-of-way of Frisco railroad, thence in a North-westerly direction along the North line of said railroad right of way to the North and South center line of said Section 5, thence North on said center Section line to place of beginning, all being in the North-west Quarter of the South-east Quarter of said Section 5, a plat of which addition as certified to by Wade Heiskell, County Surveyor in and for our said County of Oregon, is hereto attached and made a part hereof."

The above order is certainly sufficient to effect annexation, and the presumption of law is that the county court acted properly and upon the basis of a proper petition. In the present instance there is no proof to the contrary. In the case of Hollowell v. Schuyler County, 18 S. W. (2d) 498, at 499, the Missouri Supreme Court stated:

"The county court is a court of record. We must presume that the judges of that court performed their duty in accordance with law. They could not have rejected the claim without holding that emergency clause unconstitutional. Therefore we must presume that they did hold it unconstitutional in the absence of any record showing to the contrary. A judgment is presumed to be regular, and in support of its validity the court which rendered it

Honorable Percy W. Gullie

must be presumed to have found every fact and correctly reached every conclusion of law necessary to its validity. Therefore the constitutional question was then in the case."

Other cases of like import could be noted, but we do not feel that it is necessary for us to do so.

CONCLUSION

It is the opinion of this department that the order of the county court of Oregon County, made February 7, 1927, did effect the annexation of Standley's Second Addition to the Village of Koshkonong.

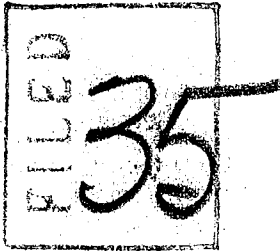
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:vlw

COSTS: Costs assessable on a plea of guilty
CRIMINAL COSTS:
MAGISTRATE COURT: to a misdemeanor in the magistrate court.
SHERIFFS:
PROSECUTING ATTORNEYS:



*Magistrate fee \$5.00
instead of \$7.50.*

April 21, 1955

Honorable J. W. Grossenheider
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Mr. Grossenheider:

This is in response to your request for an opinion dated March 14, 1955, which reads as follows:

"I would like to request an opinion from your office as to the proper criminal costs to be charged by Magistrate Court on a plea of guilty to a misdemeanor.

"Our Magistrate now charges as costs \$9.50 and I believe that he is correct. Many magistrates in this area charge as costs only \$8.50 and since this should be uniform, we are requesting this opinion.

"Section 56.310 provides a \$5.00 prosecuting attorney fee; Section 483.610 provides a \$2.50 magistrate fee and Section 57.290 provides a \$1.00 sheriff's fee for the capias or warrant and also a \$1.00 fee for the sheriff for trial and confession.

"Some of the magistrates in the adjoining counties have not been charging the last fee that I mentioned and we would appreciate an opinion from your department as to the exact costs which a magistrate must assess on a plea of guilty to a misdemeanor."

Section 56.310, RSMo 1949, provides, in part, as follows:

"Prosecuting attorneys shall be allowed fees as follows, unless in cases where it is otherwise directed by law: * * * for

Honorable J. W. Grossenheider

the conviction of every defendant in the circuit court, upon indictment or information, or before a magistrate court, upon information, when the punishment assessed by the court or jury or magistrate shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars; * * *

Section 57.290, MoRS, Cum. Supp. 1953, reads, in part:

"1. Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

For serving and returning each
capias, for each defendant \$1.00

* * * *

For every trial in a criminal
case or confession 1.00

* * * *

"5. These costs shall be taxed as other costs in criminal procedure immediately after conviction of any defendant in any criminal procedure. * * *

Section 483.610, RSMo 1949, reads, in part:

"2. In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto."

This office held in an opinion issued to Honorable A. L. Wright, Prosecuting Attorney of Stone County, under date of January 3, 1951, copy enclosed, that when the sheriff takes a

Honorable J. W. Grossenheider

prisoner before a magistrate court for trial or plea of guilty such does not count as a day's attendance upon such court so as to entitle him to the \$3.00 fee provided in Section 57.290, supra. However, it was also held therein that the sheriff is entitled to collect the \$1.00 fee for confession.

It was also held by this office in an opinion rendered to Honorable John E. Downs, Prosecuting Attorney of Buchanan County, under date of February 18, 1952, copy enclosed, that if no warrant was issued and the sheriff was not in attendance at the trial or confession he was not entitled to any fees and the only costs would be the prosecuting attorney's fee and the magistrate's fee. The prosecuting attorney's fee is assessable, however, even though he is not present when the plea of guilty is received (opinion of Attorney General to Henry H. Fox, Jr., November 7, 1951; opinion of Attorney General to E. C. Westhouse, May 19, 1953, copies of each enclosed).

Therefore, the costs would be as follows:

The prosecuting attorney's fee	\$5.00
Magistrate's fee	2.50
Sheriff's fee, if warrant is issued and served by him	1.00
Sheriff's fee, if he is in attendance when the plea of guilty is received	1.00
	<u>\$9.50.</u>

Other costs can accrue, of course, even on a plea of guilty, but we have considered only the ones apparently in question here.

CONCLUSION

It is the opinion of this office that the basic costs on a plea of guilty to a misdemeanor in a magistrate court are as follows:

The prosecuting attorney's fee	\$5.00
Magistrate's fee	2.50
Sheriff's fee, if warrant is issued and served by him	1.00
Sheriff's fee, if he is in attendance when the plea of guilty is received	1.00
	<u>\$9.50.</u>

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

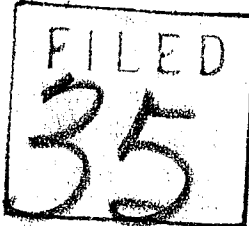
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (4)

COUNTIES:
COUNTY COURTS:
COUNTY FINANCES:
COUNTY BUDGETS:
CLASS 6 EXPENDITURES:

A third class county may not make expenditure for items in class 6 of its budget until it has sufficient cash on hand to meet all expenses of the county for the current year in the preceeding five classes plus any obligations previously incurred in class 6.



May 5, 1955

Honorable J. W. Grossenheider
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Mr. Grossenheider:

This will acknowledge receipt of your recent letter wherein you request an official opinion of this office on the following matter:

"I would like to refer you to Section 50.680 and Section 50.710 RSM 1949 and in particular that portion of the statutes under Class 6. The language of the statute in the latter instance is 'No warrant may be issued for any expense in Class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six.'

"Our county court and our county treasurer are concerned with this portion of the statute and I would like to receive an opinion from your office interpreting this statute. Surely this does not mean that a county must have enough cash on hand to pay all of the prior class expenses for the entire year before any Class 6 expense can be paid. The proper interpretation must be that actual cash means actual cash plus anticipated revenue, otherwise were the county to have more than cash to pay its Class 1 expenditures and yet not enough to pay the Class 2 expenditures, warrants would have to be protested when there would actually be a surplus on hand after the Class 1 expenses had been paid. The literal language of this statute would imply that this was the case and because I could find

Hon. J. W. Grossenheider

no cases covering this statute I would like to receive an opinion from your office interpreting this statute. I do not wish to advise the treasurer to pay the Class 6 expenses and become liable on his bond in the face of the wording of this statute without an opinion from your office."

Section 50.680, RSMo 1949, provides for the classes of expenditures and provides that class 4 shall include, among other things, the amounts necessary for the conduct of the various offices including stamps, stationery, blanks and other office supplies for the current operation of the office. It is specifically provided that such things as furniture, office machines and equipment of whatever kind shall be listed under class 6.

It appears from an examination of this section and the general scheme provided by the County Budget Law as a whole, that the idea upon which this law is based is that the county will so regulate its finances as to be able to operate on current income. It will be noted that the first five classes set up by said Section 50.680, deal with current expenses and that matters which would constitute capital expenses are relegated to class 6. This law further provides that all current expenses shall be taken care of before any expenses in the nature of capital expenditures are incurred or paid.

The county budget law repeatedly provides that capital expenditures in class 6 shall not be made until the county has sufficient cash on hand (not estimated income which, in fact, may never materialize) to meet all of its current expenses for the year. Thus, Section 50.680 provides that the county court cannot incur any expenses in class 6 unless there is actual cash on hand to pay all of the preceding classes plus any expenses previously incurred in class 6. This section also provides that the county must pay all outstanding warrants that are legal obligations of the county before they may spend any money from class 6.

Section 50.690, RSMo. 1949, contains similar provisions. It requires that each officer shall at the beginning of the year submit estimates of the moneys required for salaries and supplies, that there must be an itemized statement of the supplies that will be required and that such statement shall separate those items of supplies which are properly payable under class 4 and class 6.

It further provides that if the county does not have sufficient funds to pay all of the items in class 4 that the county court shall apportion the funds available for class 4 among the various county offices. Although it is not specifically spelled out in this statute,

Hon. J. W. Grossenheider

it is clearly contemplated that in said circumstances no expenditure will be made from class 6 when there are insufficient funds to pay all the items in class 4.

Section 50.700, RSMo. 1949, provides that the county clerk shall make certain estimates of expenditures and income and that the county court shall balance its budget on the estimated income as far as classes 1 to 5, inclusive, are concerned. However, if any expenditures under class 6 are contemplated the court is required to balance its budget as far as such class 6 expenditures are concerned on actual cash on hand, not on estimated revenue.

Section 50.710, provides that after the budget has been made and the county is going about its business and expending its funds for the purposes authorized by the budget, no warrant may be issued in class 6 unless there is actual cash in the treasury to pay all prior claims for the entire current year plus any previous warrants issued in class 6. It is further provided that no expense in class 6 shall be allowed if any warrant will go to protest and that no warrant shall be drawn or an obligation incurred in class 6 until all outstanding lawful warrants for prior years shall have been paid.

In considering payments under class 6, the Supreme Court pointed out in the case of Elkins-Swyers Office Equipment Co. v. Moniteau County, (Sup.) 209 S.W. 2d. 127, 1.c. 129:

"Section 10913 requires the clerk of the county court to spread of record by February 1st of each year certain information and estimates therein specified and, after providing for the deduction of 10% under 'estimated receipts' for delinquent taxes, 'to get the net amount estimated for purposes of budget,' requires the county court to 'balance its estimated budget for the year for the first five classes on the net estimate. If any expenditure under class six is anticipated the budget so far as expenditure under class six is concerned must be balanced on the actual cash on hand and not on estimated revenue.'"

CONCLUSION

On the basis of the foregoing it is the conclusion of this office that no expenditure may be made under class 6 unless, and until, the county has sufficient cash on hand not only to meet such expenditure but also to cover all of the expenses for the entire current year in all prior classes plus any previous expenses theretofore made in class 6 and plus any outstanding warrants for prior

Hon. J. W. Grossenheider

years. In other words, the statutes contemplate that no capital expenditure under class 6 shall be made until the county has the actual cash on hand to cover all of its current expenses and to pay all of its past debts.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:mw

STATE EMPLOYEE-
RIGHT TO ENGAGE
IN SAME WORK HE
DOES FOR THE
STATE FOR PRIVATE
GAIN - WHEN:
USE OF STATE PROPERTY
TO TRANSPORT WORKING
EQUIPMENT IN PRIVATE
BUSINESS:

1. An individual employee of the state may engage in the same kind of work he is performing for the state, for his own profit, if he is not required by statute to give his time exclusively to the state and if his private work does not interfere with the performance of his work for the state and such work is not detrimental to the state's interest. 2. The use of state property by an individual employee of the state to transport working equipment to and from the place of private business of the employee is unlawful.

October 17, 1955

Honorable Thomas D. Graham
Member, Missouri House of Representatives
512 Central Trust Building
Jefferson City, Missouri

Dear Mr. Graham:

This will be the opinion you request from the office on the question of whether or not an individual employed by the State of Missouri in a certain capacity may engage in private business for gain in the same capacity.

Your request is based upon a letter which you had received from the Master Plumbers Association of Jefferson City, Missouri, which letter you transmit with the request. The request and the letter read, respectively, as follows:

"I enclose the letter I received from the Jefferson City Masters Plumbers Association which, I believe, is self-explanatory. I will appreciate it very much if you will give me an opinion concerning the matters listed therein."

- - - - -

"I am writing to you as President of the Jefferson City Plumbing Contractors Association in accordance with the instructions of the membership to determine whether or not an individual employed by the State of Missouri in a certain capacity may engage in private business in the same capacity. Specifically, if an individual is employed by the State of Missouri to perform plumbing

Honorable Thomas D. Graham

maintenance and installation may be, at the same time, engage in the business of plumbing maintenance and installation for private gain?

"The members of the Association expressed an interest in the methods of material use and purchase that are in use to prevent a 'mixing' of state inventory and private inventory.

"Certain members are desirous of knowing what tool and equipment controls are exercised at state institutions. Further questions were raised regarding the use of transportation equipment belonging to the State."

We have read and carefully considered the statements as they are given in the request and in such letter to determine if in said question and letter, or in either of them, there are contained legal principles involving public interest upon which this office is authorized to give an opinion. We shall answer these questions as they are above set forth. With respect to the other matters noted, the interest indicated in such letter is that the writer thereof desires to be informed as to what methods of material use and purchase are followed to prevent "mixing" of state inventories and private inventories, and also the expressed desire to be informed as to what tool and equipment controls are exercised in state institutions. We feel that we must say that we do not believe those matters are of such public interest as to permit this office to give an opinion upon them. These conditions would be, and are, if they exist and are the subjects of controversy, matters for the heads of state departments involved to supervise and adjust. This office, therefore, respectfully declines to express any views herein on such matters.

It does not appear from the request, nor does said letter make any statement, that any of the acts assumed to be true in the two supposed questions, are actually being done or that the acts of the state departments claimed to be carried on, are

Honorable Thomas D. Graham

actually being performed in any department. We believe, nevertheless, that the two questions submitting as they do impersonal legal principles that might affect the public interest, and assumed to be true, should therefore be answered.

The first question is: If an individual is employed by the state in a certain capacity may he engage in private business for gain in the same capacity. The individual assumed in the request to be a state employee is, apparently, not a state officer. The courts and text writers hold that there is a definite distinction between a public "employee" and a public "officer," according to the facts and conditions involved. A public employee may at the same time be a public officer, but not necessarily so designated. Employment is generally understood as a performance of temporary services or duties. The Text of 46 C.J., 929, discussing the criteria by which an employment may be designated from an office, states that text as follows:

"The term 'public office' embraces the ideas of tenure and of duration or continuance; hence, an important distinguishing characteristic of an officer is that the duties to be performed by him are of a permanent character as opposed to duties which are occasional, transient, and incidental. * * *"

Unless an individual is required by statute to give his entire time exclusively to the state we know of no reason nor rule of law, civil or statutory, that would prevent such employee from doing the same kind of labor and work for himself for profit, if it does not conflict with his duty to the state or business the state is engaged in.

We have inquired of the Division of Public Buildings if there is any department, to its knowledge, where any practice such as is described in the request, is prevalent or is in existence in any public work, particularly public buildings. We are advised by that division that there are no such conditions existing in that department.

Honorable Thomas D. Graham

Answering the first question, it is the opinion of this office that if such assumed facts were the actual facts an individual employed by the state in plumbing maintenance and installation work would have the lawful right, if not required by statute to give the whole of his time exclusively to the state, to engage in the same kind of work for himself, for private gain, that he is performing for the state.

The second question is whether, as it is also assumed in the request to be the fact, the use of transportation equipment belonging to the state may be indulged in by said individual in transporting tools and equipment used and to be used in such private and personal business, for private gain, to and from its private place of business.

The answer to this question is that such use of property of the state by an individual employee of the state for private gain in any character of business is unlawful. It would be in conflict with Section 38(a) of Article III, of the present Constitution of this state, which prohibits the enactment of a legislative act for the grant of public money or public property to an individual or a corporation. Said Section 38(a), of Article III, of the present Constitution regarding those matters reads, in part, as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation,
* * *."

The legislature of this state, implementing the above quoted section of the constitution, has enacted Section 301.260, RSMo 1949, requiring the issuing by the Director of Revenue of certificates for state and municipally owned motor vehicles. This section providing for such certificates and prohibiting their use by individuals for private purposes, in section 1 of said section, states in part the following:

"1. * * * No officer or employee or other person shall use such motor vehicle for other than official use."

Honorable Thomas D. Graham

CONCLUSION

Considering the premises, it is the opinion of this office that (1): An individual employed by the state would have the lawful right, if not required by statute to give the whole of his time exclusively to the state and if it does not interfere with the performance of his duty to the state and is not detrimental to the state's interest, to engage in the same kind of work for himself for private gain that he is performing for the state; (2) The use of property of the state by an individual employee of the state, to transport tools and equipment used and to be used in the employee's personal business for private gain, would be unlawful because in conflict with the provisions of Section 38(a) of Article III of the Constitution of this State and the provisions of Section 301.260, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Crowley.

Very truly yours

John M. Dalton
Attorney General

GWC:lc

FIREARMS:

Firearms which do not have stamped upon them the name of the maker of the serial number may not be purchased by a Missouri resident and brought into Missouri.



December 29, 1955

Honorable J. W. Grossenheider
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"One of the residents of Laclede County is an antique firearm collector. In order to purchase some old firearms which have no serial numbers or identification on them from the State of California he needs some sort of permit from the State of Missouri. We have searched through the statutes including Section 564.620-630-640, but we do not believe that these statutes are applicable to this situation.

"Can you advise this office what sort of a permit an antique firearm collector must obtain in order to purchase antique firearms from other states and in order to keep a collection of antique firearms and will you advise us what statutes are applicable to such a situation."

All section references will be to RSMo 1949.

Section 564.610 through 564.660, referred to you, pertain to weapons which, by reason of their size, are capable of being concealed about the person. For that reason these sections would not have any application to weapons which were not thus capable of concealment.

Section 564.620 reads as follows:

"No wholesaler or dealer therein shall have in his possession for the purpose of sale, or shall sell, any pistol, revolver, or other firearm of a size which may be concealed upon the person, which does not have plainly and permanently stamped upon the metallic portion thereof, the trademark or name

Honorable J. W. Grossenheider

of the maker, the model and the serial factory number thereof, which number shall not be the same as that of any other such weapon of the same model made by the same maker, and the maker, and no wholesale or retail dealer therein shall have in his possession for the purpose of sale, or shall sell, any such weapon unless he keep a full and complete record of such description of such weapon, the name and address of the person from whom purchased and to whom sold, the date of such purchase or sale, and in the case of retailers the date of the permit and the name of the circuit clerk granting the same, which record shall be open to inspection at all times by any police officer or other peace office of this state."

Section 564.630 reads:

"1. No person, other than a manufacturer or wholesaler thereof to or from a wholesale or retail dealer therein, for the purposes of commerce, shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving such weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering such weapon, within thirty days after the issuance thereof, a permit authorizing such person to acquire such weapon.

"2. Such permit shall be issued by the circuit clerk of the county in which the applicant for a permit resides in this state, if the sheriff be satisfied that the person applying for the same is of good moral character and of lawful age, and that the granting of the same will not endanger the public safety. The permit shall recite the date of the issuance thereof and that the same is invalid after thirty days after the said date, the name and address of the person to whom granted and of the person from whom such weapon is to be acquired, the nature of the transaction, and a full description of such weapon, and shall be countersigned by the person to whom granted in the presence of the circuit clerk. The circuit clerk shall receive therefor a fee of fifty cents."

"3. If the permit be used, the person receiving the same shall return it to the circuit clerk within thirty days after the expiration, with a notation thereon showing the date and manner of the disposition of such weapon. The circuit clerk shall keep

Honorable J. W. Grossenheider

a record of all applications for such permits and his action thereon, and shall preserve all returned permits.

"4. No person shall in any manner transfer, alter or change any such permit or make a false notation thereon or obtain the same upon any false representation to the circuit clerk granting the same, or use or attempt to use a permit granted to another."

Section 564.640 reads as follows:

"No person within this state shall lease, buy or in anywise procure the possession from any person, firm or corporation within or without the state, of any pistol, revolver or other firearm of a size which may be concealed upon the person, that is not stamped as required by Section 564.620; and no person shall buy or otherwise acquire the possession of any such article unless he shall have first procured a written permit so to do from the circuit clerk of the county in which such person resides, in the manner as provided in section 564.630."

From the above it clearly appears that in order to purchase these antique firearms, it is necessary that the purchaser acquire the permit which is the subject of Section 564.630, supra.

It is also clear that Sections 564.620 and 564.640, supra, require firearms purchased under the permit referred to in Section 564.630 to have, "permanently stamped upon the metallic portion thereof, the trademark or name of the maker, the model and the serial factory number thereof, which number shall not be the same as that of any other such weapon of the same model and made by the same maker * * *."

All of the above is perfectly clear and plain so far as firearms are concerned, which carry the stampings referred to in Section 564.620, but you referred to firearms which were manufactured before any of the stampings referred to in Section 564.620 were required by law to be placed upon firearms. Since these firearms referred to by you do not have the required stampings, a literal construction of Sections 564.620, 564.630, and 564.640, would result in a situation in which there would be no possible legal way in which a person in Missouri could buy and bring into Missouri the unstamped firearms now in California. Can it be said that the Missouri Legislature which enacted the above sections of law intended such a result? We cannot believe that they did, but we do believe that such is the result of their legislation.

Honorable J. W. Grossenheider

The following portion of Section 564.640 is perfectly clear and perfectly plain, and so far as we can see, admits of no exceptions. "No person within this state shall * * * buy or in anywise procure the possession from any person * * * within or without the state of any pistol, revolver or other firearm of a size which may be concealed upon the person that is not stamped as required by Section 564.630* * *." We believe that this conclusion is unfortunate but inescapable, and that the situation which results from it can only be changed by legislative enactment. We do not believe that any permanent good can result from giving to the words of a statute meanings which they clearly do not possess, although the immediate result of so doing might be desirable.

CONCLUSION

It is the opinion of this department that firearms which do not have stamped upon them the name of the maker or the serial number may not be purchased by a Missouri resident and brought into Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

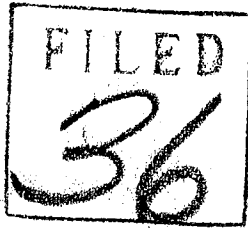
HPW/ld

PHYSICIANS & SURGEONS:

PRACTICE OF MEDICINE:

DEFINITION OF "PRACTICE
OF MEDICINE" :

Unlicensed physicians may not engage in practice of medicine, regardless of nature of employer or character of supervision.



March 29, 1955

Mr. John A. Hailey
Executive Secretary
State Board of Medical Examiners
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated July 20, 1954, which reads as follows:

"The Missouri State Board of Medical Examiners hereby requests your opinion on the following points:

"1. A legal definition of the practice of medicine in the State of Missouri;

"2. Whether physicians who may be graduates of medical schools and licensed in some other state or country, but not licensed in the State of Missouri, may engage in the activities which fall within the definition of the practice of medicine;

"3. Whether such persons may engage in such activities under the supervision of a licensed physician; and

"4. Whether such unlicensed physicians may engage in the practice of medicine as will have been previously defined while in the employ of a medical school, private or state hospitals, or other institutions; * * * "

1. The law governing the subject of the practice of medicine and surgery in this state is found in Chapter 334, RSMo 1949. The following sections are particularly pertinent to your inquiry:

Section 334.010. "It shall be unlawful for any person not now a registered physician within the meaning of the law to practice

Mr. John A. Hailey

medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in the state of Missouri, except as herein provided."

Section 334.030. "1. Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or other afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat, the sick or others afflicted with bodily or mental infirmities, without a license from the state board of medical examiners shall, upon conviction, be adjudged guilty of a misdemeanor for each and every offense; and treating each patient shall be regarded as a separate offense; provided, that physicians registered on or prior to March 1, 1901, shall be regarded for every purpose herein as licensees and registered physicians under the provisions of this law.

"2. Any person filing or attempting to file as his own, a license of another or a forged affidavit of identification, shall be guilty of a felony and upon conviction thereof, shall be subjected to such fine and imprisonment as are made and provided by the statutes of this state for the crime of forgery in the second degree.

"3. Upon receiving information that any provision of this section has been or is being violated, the secretary of the state board of medical examiners shall investigate the matter and upon probable cause appearing, shall, under the direction of the board, file a complaint with the prosecuting or circuit attorney of the county or city where the alleged offense occurred."

Mr. John A. Hailey

Section 334.150. "It is not intended by sections 334.010 to 334.180 to prohibit gratuitous service to and treatment of the afflicted, and sections 334.010 to 334.180 shall not apply to commissioned surgeons of the United States army, navy, and United States public health service while in the performance of their official duties, nor to any licensed practitioner of medicine and surgery in a border state attending the sick in this state; provided, he does not maintain an office or appointed place to meet patients or receive calls within the limits of this state; and provided, that such practitioner comply with the statutes of Missouri and the rules and regulations of the department of public health and welfare relating to the reports of births, deaths and contagious diseases, nor shall said section apply to the provisions of chapter 337, RSMo 1949. And sections 334.010 to 334.180 shall not apply to persons who endeavor to cure or prevent disease or suffering by spiritual means or prayer; provided, that quarantine regulations relating to contagious disease are not infringed upon; provided further, that no provision of this section shall be construed or held to in any way with the enforcement of the rules and regulations adopted and approved by the division of health of the state department of public health and welfare or any municipality under the laws of this state for the control of infectious or contagious diseases."

The term "practice of medicine," under statutes prohibiting the practice of medicine without a license, has been held in some states to be used in its technical sense. However, in Missouri the term "practice of medicine," under the above-quoted statutes, has been construed as being used in its ordinary, common and popular sense. *Kansas City v. Baird*, 92 Mo. App. 204; 70 C. J. S., Physicians and Surgeons, Section 10a, page 832. In fact, it is to be noted that under the above statutes the prohibition goes beyond the practice of medicine as it may be understood generally and extends to the treatment of "the sick

Mr. John A. Hailey

and others afflicted with bodily or mental infirmities," which may or may not fall within the generally understood and accepted definition of the practice of medicine.

In State v. Smith. 233 Mo. 242, 135 S. W. 465, 33 L. R. A., N.S., 179, it is pointed out that the original bill passed in 1877 merely sought "to regulate the practice of medicine and surgery." In 1901 the law was amended so as to provide that "all persons desiring to practice medicine or surgery in this state, or to treat the sick or afflicted" should apply to the State Board of Health for examination. The court said, Mo. l.c. 257:

"It is obvious that the Legislature, by this amendment, intended to include those who practice neither medicine nor surgery in any of its departments, but who profess to cure, and who treat or attempt to treat, the sick by means other than medicine or surgery. Evidently the Legislature, in order to guard the overcredulous against injury that might result from yielding to the solicitations and professions of men who ignorantly undertake to diagnose and treat human ailments, deemed it proper, in the exercise of its police power, to require all persons, who undertake to so treat the sick, to show that they possess the qualifications which the lawmakers prescribe as essential."

It is well to bear in mind that Section 334.030, supra, provides for three separate and distinct offenses. Discussing this point in State v. Young, 215 S. W. 499, 500, the St. Louis Court of Appeals said:

"Section 8315 provides that any person practicing medicine or surgery in this state and any person attempting to treat the sick, etc., and any person advertising himself so as to indicate that he is authorized to or does practice medicine or surgery, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the state board of health, shall be deemed guilty of a misdemeanor.

Mr. John A. Hailey

"This statute provides for three separate and distinct offenses, and, the defendant in this case being charged with all three of the offenses, the verdict should have been specific as to whether he was guilty of one or the other or all of them. As the matter was submitted to the jury, some of the jury may have believed him guilty of one of the offenses, and some of the other. The defendant is entitled to have twelve men believe him guilty of either one or all of the stated violations of the statute."

Section 8315 of the 1909 Revision, in the above quotation, is the present Section 334.030 of the 1949 Revision.

The term "practice of medicine" has been construed on several occasions by the courts of this state. Most of the cases and apt quotations therefrom are found in the following opinions of this office, copies of which we enclose:

Dr. H. S. Gove, January 14, 1937;
Dr. Harry F. Parker, July 29, 1938.

Supplementing those opinions, we herewith quote the following from 70 C.J.S., Physicians and Surgeons:

Section 1, page 815.

"One practicing medicine practices the art of preventing, curing, or alleviating diseases, and remedying as far as possible the results of violence and accident. 'Practice medicine' is a term of frequent occurrence in the statutes, has frequently been the subject of statutory definition, and includes diagnosis.

"The practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease or pain; popularly it consists in the discovery of the cause and nature of disease, and the administration of remedies or the prescribing of treatment therefor. It includes the application and use of medicines and drugs for the

Mr. John A. Hailey

purpose of curing, mitigating, or alleviating bodily diseases; but it does not wholly depend on the administration of drugs. It may be said to consist in three things: (1) In judging the nature, character, and symptoms of the disease. (2) In determining the proper remedy for the disease. (3) In giving or prescribing the application of the remedy to the disease. "

Section 10b, page 834:

"Under the broad and comprehensive terms of some statutes requiring a license or certificate, and the construction placed thereon, the practice of medicine consists in judging the nature, character and symptoms of disease, in determining the proper remedy for the disease, and in giving or prescribing the application of the remedy to the disease. More specifically, these statutes apply to the offer to treat or the treatment of any human ailment, disease, disorder, pain, injury, infirmity, or deformity by any system or method, or in any manner, or without any system, and by the employment or application of any curative or therapeutic agency, whether administered internally or applied externally, provided the giving or administration of the treatment is pursued as a business, calling, or profession, discussed supra subdivision a of this section, and for compensation, discussed infra subdivision n of this section. Also, under the statutes a license or certificate is necessary to enable a person lawfully to engage in the business or practice, for fee or reward, of prescribing, or prescribing and furnishing, drugs, medicines, or other agencies or remedies for the treatment, cure, or relief of any bodily disease.

"While a person without a license or certificate undoubtedly violates the statutes when he not only diagnoses, but also prescribes, recommends, furnishes, or applies a remedy,

Mr. John A. Hailey

he may also violate the statutes by diagnosing without prescribing any drug or administering any treatment, or by treating, prescribing, or prescribing and furnishing, medicine, without making any diagnosis. That the patient treated or prescribed for does not in fact have any ailment or disease does not prevent the application of the statutes; nor is the efficacy of the remedy administered a material factor. The guarding and protection of patients suffering from mental disease is not a medical act rendering it necessary to have a license to practice medicine to perform such an act."

Difficulty may arise in determining whether any specific act or series of acts constitutes "practicing medicine" or "attempting to treat the sick" within the prohibition of the statute. Basically, however, if it involves diagnosis of an ailment, the prescribing of a remedy or treatment as these terms are generally and popularly understood, it would constitute the practice of medicine within the meaning of Section 334.030, RSMo 1949.

2. The answer to your second question is found in State v. Davis, 194 Mo. 485, 92 S. W. 484, 4 L.R.A., N.S., 1023. There the defendant was a practicing physician of the state of Illinois but was not licensed in the state of Missouri. He had a room at a hotel in Memphis, Missouri, professed to be a physician and held himself out as such. A patient applied to him for treatment at the hotel and the defendant diagnosed his case in the usual and ordinary way of practicing physicians and prescribed remedies. However, his prescription for medicine was in the form of a blank which was required to be sent to the state of Illinois and then the defendant would send the medicine to the patient from Illinois. The patient took the medicine according to directions and made payments to defendant. The court held that defendant clearly was practicing medicine in this state without a license and sustained a conviction under the statute.

Subject to the exceptions contained in Section 334.150, supra, we believe it clear from the Davis case that it is of no moment that a physician may be licensed to practice medicine in some other state or country. Unless he holds a license from the State Board of Medical Examiners of the State of Missouri he may not practice medicine within this state. (See also the en-

Mr. John A. Hailey

closed opinion of this office issued to Dr. H. S. Gove, January 14, 1937.)

3. In answer to your third question we direct your attention to the case of State v. Young, supra. This was a prosecution for practicing medicine without a license. As a matter of defense the appellant contended that he was engaged as an assistant to a regularly licensed physician, Dr. Tarlton, and offered evidence to that effect, which the court excluded. The appellate court said, 215 S. W., 1. c. 501:

"* * * This was not error, as the defendant could not escape the effect of the statute by showing that in practicing his profession he was employed by another and acted under another's direction."

See also 70 C.J.S., Physicians and Surgeons, Section 10k, page 845, where it is said:

"Generally, where a person without a license or certificate performs acts constituting the practice of dentistry, medicine, or surgery, he is not relieved from liability therefor by the fact that he performs the acts as an assistant to, or under the direction and supervision of, a duly authorized practitioner unless he is within an express statutory exemption, as discussed supra Sec. 9. However, the services of an ordinary nurse performed under the direction of a duly qualified surgeon are not within the statute; nor does it constitute the practice of medicine for an X-ray specialist to use an X-ray machine in giving treatment as advised by a duly licensed medical practitioner. The performance of such duties as are usually and ordinarily performed by internes does not constitute the practice of medicine or a representation that the interne is authorized to practice medicine. A layman who was merely present at an examination and assisted a licensed physician in making a diagnosis has been held not guilty of unlawfully practicing medicine."

Mr. John A. Hailey

Therefore, it seems clear that one who does not have a license from the Missouri State Board of Medical Examiners, unless he falls within the exemptions of Section 334.150, supra, may not engage in activities constituting the practice of medicine, and the fact that he does so under the supervision of a regularly licensed physician will constitute no defense to a prosecution for practicing medicine without a license.

In passing, we should like to call your attention also to the case of *In re Hughes v. State Board of Health*, 348 Mo. 1236, 159 S. W. (2d) 277, which was a proceeding before the Board for the revocation of a license. In discussing one of the charges made against the appellant the court said, Mo., l. c. 1242:

"The evidence was sufficient to support the charge. Steinmeyer was employed full time by respondent. At first he kept books, then became a technician. Respondent specialized in the treatment of venereal diseases in men. At the instigation and with the knowledge of respondent, Steinmeyer, though not a physician, received and examined patients in respondent's office, made diagnoses, determined the treatment, treated them and accepted fees from them for respondent. He would do this without any immediate supervision of respondent and at times when respondent was away from the office. Such acts of Steinmeyer constitute the practice of medicine. Practicing without a license is unlawful. When done at the command and with knowledge and aid of a physician, the latter is guilty of unprofessional conduct. The very purpose of the act in protecting the public from untrained and incompetent persons is thereby violated by one who should be foremost in upholding it. See *Dillard v. State Board of Medical Examiners*, 69 Colo. 575, 196 Pac. 866. Some of the states by statutes have declared such conduct to be unprofessional."

4. Your fourth question may be answered very simply. Subject to the exceptions contained in Section 334.150, supra, no one, regardless of who his employer may be, may engage in activities constituting the practice of medicine in the state of Missouri unless he is the holder of a license from the State Board of Medical Examiners.

Mr. John A. Hailey

CONCLUSION

It is the opinion of this office that, subject to the exceptions contained in Section 334.150, RSMo 1949, a physician who is not licensed in the state of Missouri may not engage in activities constituting the practice of medicine within the state of Missouri, regardless of who his employer may be or under whose supervision he may do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

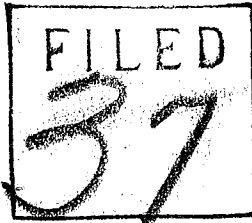
Yours very truly,

JOHN M. DALTON
Attorney General

Encs: Opns: H.S.Gove, Jan. 14, 1937;
Harry F. Parker, July 29, 1938.

JWI:ml:lc

CHIROPODISTS: False, misleading or deceitful advertising
PROFESSIONS: by a chiroprapist may be sufficient ground
LICENSES: for revocation of his license to practice
chiroprasty.



January 13, 1955

Honorable L. A. Hansen, D.S.C.
Secretary
Missouri State Board of Chiroprasty
800 Professional Building
Kansas City, Missouri

Dear Mr. Hansen:

This office, on December 14, 1954, rendered an opinion to you, wherein it was held that truthful advertising by a chiroprapist was not a ground for revocation of his license to practice chiroprasty. On December 18, 1954, you asked for an opinion on the following question:

"Does the Board have the power to revoke a chiroprasty license of a chiroprapist whose advertising is untruthful, false, misleading, or deceitful?"

The grounds upon which a chiroprapist's license may be suspended or revoked are set forth by Section 330.160, RSMo Cum. Supp. 1953. That section reads:

"1. The state board of chiroprasty may refuse to issue a certificate of registration to an applicant or may refuse to renew, or may suspend or revoke, any certificate of registration of a registered chiroprapist for any of the following causes:

"(1) His conviction of a felony, as shown by a certified copy of the record of the court in which he was convicted;

"(2) His procurement of, or attempt to procure, a certificate of registration or money or any other thing of value by fraudulent misrepresentation;

Honorable L. A. Hansen, D.S.C.:

"(3) His commission of acts constituting malpractice;

"(4) His continued practice with knowledge that he has an infectious or contagious disease;

"(5) His failure to display in his office his current certificate of registration;

"(6) His practicing, or attempting to practice, under a name other than his own;

"(7) His failure to comply with a reasonable standard of proficiency;

"(8) A mistake of material fact;

"(9) His unprofessional conduct;

"(10) His habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs;

"(11) His betrayal of a professional secret;
or

"(12) His having professional connection with, or knowingly lending the use of his name to an unregistered chiropractist.

"2. The board after hearing may, by majority vote, revoke any certificate issued by it, and cancel the registration of any chiropractist who has been convicted of violation of any of the provisions of this chapter. The board may also, after hearing by majority vote, revoke the certificate and cancel the registration of any person whose registration was granted upon mistake of material fact. The board may subsequently, but not earlier than one year thereafter by majority vote, reissue any certificate and register anew any chiropractist whose certificate was revoked, and whose registration was canceled by the board, except as herein provided."

(Underscoring ours.)

Honorable L. A. Hansen, D.S.C.:

False, deceitful, or misleading advertising could only be a violation of subparagraphs number two or nine, if of any.

If a licensed chiroprapist's advertising is such as to constitute fraudulent misrepresentation concerning his professional activities, for the purpose of obtaining clients and their money, it would be a violation of subparagraph (2) of Section 330.160, supra.

In ascertaining what constitutes unprofessional conduct, we find this statement of the Supreme Court in State ex rel. Lentine vs. State Board of Health, 334 Mo. 220, 65 S.W. (2d) 943, 949:

"* * * Unprofessional conduct as used in statutes does not mean merely unethical conduct as judged by the peculiar standards of the profession but is generally held to mean dishonorable conduct. The mere fact that conduct is unprofessional is not enough to justify revocation but it must have an additional quality, as, for example, be also dishonorable or disreputable. 21 R.C.L. p. 363. * * *."

In Hughes vs. State Board of Health, 159 S.W. (2d) 277, 278, in construing what might be considered "unprofessional or dishonorable conduct" the Supreme Court stated:

"* * * Any conduct, although not specified, which by common opinion and fair judgment is determined to be unprofessional or dishonorable, may constitute grounds of revocation. * * *."

The test, then, is whether untruthful, false, misleading, or deceitful advertising by a chiroprapist would be considered by common opinion and fair judgment to be unprofessional or dishonorable. It is noted, in passing, that such advertising may be a criminal offense under Section 561.660, RSMo 1949. That section reads:

"1. Any person, firm, corporation, or association who, with intent to sell or in anywise dispose of merchandise, securities, service or anything offered by such

Honorable L. A. Hansen, D.S.C.:

person, firm, corporation or association, directly or indirectly, to the public for sale or distribution or with intent to increase the consumption thereof or to induce the public in any manner to enter into any obligation relating thereto or to acquire title thereto or an interest therein, makes, publishes, disseminates, circulates or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated or placed before the public, in this state, in a newspaper or other publication or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter or in any other way, an advertisement of any sort regarding merchandise, securities, service or anything so offered to public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor.

"2. And shall upon conviction thereof be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days, or by both such fine and imprisonment; providing, that nothing herein shall apply to any proprietor or publisher of any newspaper or magazine who publishes, disseminates or circulates any such advertisement without the knowledge of the unlawful or untruthful nature of such advertisement."

Aside from the criminal aspect, we believe that advertising by a practitioner of a healing art (and chiropractors are such within their field), calculated to deceive or delude persons afflicted by physical infirmities would be condemned by common opinion as unprofessional and dishonorable.

CONCLUSION.

It is, therefore, the opinion of this office that false, misleading, or deceitful advertising by a chiropractist

Honorable L. A. Hansen, D.S.C.:

may be sufficient ground for revocation of his license to practice chiropody.

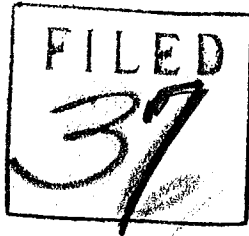
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

CHIROPODISTS: : lady
 PHYSICIANS & SURGEONS: : The license of a/chiroprapist may not
 LICENSES: : be revoked for having two entries in
 : the classified section of a telephone
 : directory; one entry under her former
 : surname referring to the second entry
 : listed under her present surname.
 :



April 28, 1955

Honorable L. A. Hansen, D.S.C.
 Secretary
 Missouri State Board of Chiroprody
 800 Professional Building
 Kansas City, Missouri

Dear Dr. Hansen:

You have requested of this office an opinion regarding possible revocation of the license of one Dr. Rosemary Ralstum to practice chiroprody in Missouri. We understand the factual situation to be as below recited. Dr. Ralstum was licensed, while a single person, to practice under her maiden name of Ralstum. She subsequently married a chiroprapist named Moore, and they practiced together, both using the name Moore. The Moore's some time later severed their matrimonial and professional ties, the former by divorce and the latter by the removal of Dr. Rosemary's office to another location. Dr. Rosemary resumed her maiden name of Ralstum. In the chiroprapists' section of the St. Louis classified telephone directory, Dr. Rosemary is listed in the "M's" as "Moore Rosemary - See Ralstum Rosemary 2718 Sutton-Missn 7-2005", and is listed in the "R's" as "Ralstum Rosemary Block South 7400 Manchester 2718 Sutton - Missn 7-2005". This type of listing appeared in the 1954 and 1955 edition of the telephone directory. In May, 1954, Dr. Ralstum was called before the State Board of Chiroprody and admonished to drop one of the listings in subsequent editions of the directory. Pursuant to an agreement made at that meeting, Dr. Ralstum executed the following:

"I, Rosemary Moore , do now state that my listing in the St. Louis County Telephone Directory for only 1955, shall be as follows:

Ralstum, Rosemary formerly Moore
 1 block south 7400 Manchester
 2718 Sutton Ave. Mi 7-2005

unless the law
 changes or I find
 it does not work
 satisfactory.

Honorable L. A. Hansen, D.S.C.:

This will be the only listing in the 1955 Telephone Books.

I also agree that in the 1956 Telephone Books of St. Louis and St. Louis Counties that I will drop the words, 'formerly Moore.'

You inquire whether Dr. Ralstum's license may be revoked by authority of Section 330.160, RSMo Cum. Supp. 1953, which provides that a chiropracist's license may be revoked or suspended upon "His practicing, or attempting to practice, under a name other than his own."

It does not to us, from the facts presented, seem that Dr. Ralstum is practicing under a name other than her own. The entries in the telephone directory clearly indicate that her name is Ralstum, and the Moore entry clearly indicates that the person formerly bearing the name Rosemary Moore now bears the name Rosemary Ralstum. According to the case of Berry vs. Alderson, 59 Cal. App. 729, 211 Pac. 836, statutes such as this were "designed to offer a much wider protection to the public by assuring to it a reasonably certainty of knowing in every case, precisely with whom it was dealing, the importance of the relation of physician and patient, and the very serious consequences which might follow improper, unskillful, or negligent treatment, rendering such openness and candor particularly desirable. * * *."

The public will not be deceived by the directory entries. They will know the name of the physician with whom they deal. The public knows that the surnames of women are subject to change by reason of marriage, divorce, and possible remarriage, and that such changes often occur. The deprivation of license to practice the profession for which one has spent many years in preparation is a serious affair which should not be undertaken unless there is clear violation of the statutory prohibitions. There does not appear to us to be such violation in this situation, and we are constrained to the opinion that an action of revocation would not lie.

CONCLUSION

In the premises, it is the opinion of this office that

Honorable L. A. Hansen, D.S.C.:

the license of a lady chiropodist may not be revoked for having two entries in the classified section of a telephone directory; one entry under her former surname referring to the second entry listed under her present surname.

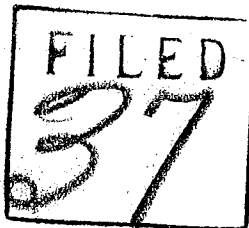
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:irk

PENITENTIARY: : Money received by the state from the sale of
TREASURER: : steel beams salvaged from damaged or destroyed
PUBLIC FUNDS: : buildings within the Missouri penitentiary,
: should be deposited in the state treasury to
: the credit of the ordinary revenue fund.
.....



May 16, 1955

Honorable C. R. Hardy
Auditor
Department of Corrections
Division of Penal Institutions
Jefferson City, Missouri

Dear Mr. Hardy:

Your letter of March 30, 1955, requested an opinion of this office on the following:

"The Penal Department is now in the process of clearing debris and disposing of the scrap steel which is being salvaged within the walls of the penitentiary. The State Purchasing Agent advertised and sold the scrap to the highest bidder with the provision that all beams and lengthy steel were to be cut into short pieces for shipment, the expense of cutting, which is done by acetylene torch, is to be borne by the Division of Penal Institutions and will approximate some \$2,000.

"The estimate on the amount of steel to be sold is approximately \$6,000 or \$8,000.

"Please give an opinion concerning money received from the sale of the scrap steel and iron as to whether the amount, above the expense of cutting, should be returned to the Department of Revenue or if it may be placed in the penitentiary Fund account and used by the Division of Penal Institutions."

Honorable C. R. Hardy:

The fundamental law of Missouri touching upon original disposition of money received by the state is Section 15, Article IV, Constitution of Missouri, 1945. That section reads:

"All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. Such institutions shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits on demand of the state treasurer authorized by warrants of the state auditor. No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

It is apparent that money received from sale of property owned by the state should go into the state treasury. The question is to which fund such money belongs.

Section 217.290, RSMo 1949, provides for several funds in connection with the penal institutions. That section reads:

"1. The state treasurer shall carry on the books of his office as separate accounts the following funds:

- (1) Penitentiary revolving fund;
- (2) Penitentiary earning fund;
- (3) Intermediate reformatory revolving fund;
- (4) Intermediate reformatory earning fund.

"2. All moneys derived from sales of any articles manufactured in any of the industries conducted under this chapter shall be paid into the state treasury and credited to such funds as follows:

"(1) The division shall ascertain and determine on the first of each month from the books, records and accounts kept showing the business operations of the penitentiary or the intermediate reformatory, the amount of money received by each institution each month due to the purchase of raw material for use and manufacture, and said sum when so determined shall be deposited in the revolving fund of the institution which received same;

"(2) The revolving funds of both institutions shall be used only for the purpose of purchasing raw material, machinery or other equipment or in the erection of buildings or making other improvements in plants in connection with the industries carried on or to be carried on in the penitentiary or the intermediate reformatory or on the farms or land mentioned in section 217.130 or elsewhere, and in the manufacturing, handling and marketing of articles so produced, until disposed of, according to the provisions of this chapter, and the money in either such revolving fund shall be paid by the treasurer of the state upon warrants duly issued upon verified vouchers of the division.

"(3) The division shall further determine what part of said receipts are due to labor and other profits in the operation of said penitentiary or intermediate reformatory, and said amount shall be deposited in the earning fund of the institution for which the amount was received.

"(4) The money deposited in either earning fund shall be used by the division for

Honorable C. R. Hardy:

the use of, support and maintenance of the penitentiary or intermediate reformatory respectively and such expenses as come under section 217.270 and the treasurer shall pay same upon warrants drawn on the requisition of the board."

The above statute is not applicable to the instant case because the statute plainly indicates that the funds therein treated are those connected with the operation of the prison industries and farms. The present situation may not properly be considered one of the prison industries contemplated by Section 217.290 even though convict labor may be utilized in salvaging the steel beams.

Section 33.080, RSMo 1949, provides:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the constitution of this state), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed,

Honorable C. R. Hardy:

be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; Appropriations, gifts or grants from the federal government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the governor and biennially to the general assembly."

The above statute is of no benefit in the present situation because the money was not collected for any particular purpose or fund.

There being no other statute which declares this money as being part of any specific fund, we conclude that the money should be placed to the credit of the ordinary revenue fund of the state. This conclusion is based upon the reasoning and holding in an opinion rendered by this office on September 15, 1952, to Honorable M. E. Morris, State Treasurer. A copy of that opinion is enclosed.

CONCLUSION

It is, therefore, the opinion of this office that money received by the state from the sale of steel beams

Honorable C. R. Hardy:

salvaged from damaged or destroyed buildings within the Missouri penitentiary, should be deposited in the state treasury to the credit of the ordinary revenue fund.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

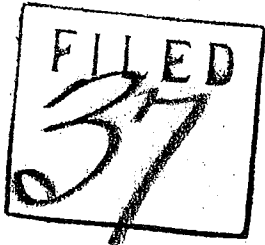
Yours very truly,

JOHN M. DALTON
Attorney General

Enc:

PMcG:irk

DEPARTMENT OF CORRECTIONS: Assets of previously existing funds
should be transferred to newly
PENITENTIARY: created Working Capital Revolving
Fund under House Bill No. 377 of
the 68th General Assembly.



July 27, 1955

Mr. C. R. Hardy
Auditor
Department of Corrections
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this office,
which request reads as follows:

"A written opinion from your office is respectfully requested concerning House Bill No. 377, Section 12, Paragraph 5, of the Sixty-eighth General Assembly, which states the Penitentiary Revolving Fund, Penitentiary Earnings Fund, Intermediate Reformatory Revolving Fund, Intermediate Reformatory Earnings Fund, and Convicts' Relief Fund are hereby abolished and any monies in these funds on the effective date of this Act shall be immediately transferred to the Working Capital Revolving Fund.

"There is in the present assets of the penitentiary Revolving Fund in addition to the money in the State Treasurer's office, accounts receivable items totaling approximately \$100,000, raw materials and finished products in various factories totaling approximately \$250,000. The inventories carried by the factories were purchased out of the original Revolving Fund account and have been carried for the normal manufacturing and operation of the various factories. Are we right in assuming that the accounts receivable items and inventory items are to be transferred as is to the new Working Capital Revolving Fund?

Mr. C. R. Hardy

"The farms of the penitentiary, which are also to be operated under the Working Capital Revolving Fund, have livestock which is held for beef production, a sizable dairy herd which supplies the milk and cream for the penitentiary, work stock for the farms operations and machinery and equipment which is not specifically mentioned in House Bill No. 377.

"Are we right in assuming that the transfer should be made for the assets of the farms?"

House Bill No. 377 of the 68th General Assembly was signed by the Governor on July 14, 1955. It contains an emergency clause, and therefore became effective on that date.

Section 12 of House Bill No. 377 provides:

"Section 12. 1. The gross or total receipts and income of all industrial and farm operations of the institutions within the department of corrections shall be paid into the state treasury and credited to the 'Working Capital Revolving Fund,' which is hereby created.

"2. The working capital revolving fund shall be used only for the establishment, maintenance, rehabilitation, expansion and operation of the prison industrial and farm programs and may be expended for:

(1) The purchase of raw materials to be manufactured, processed or grown, including seed, fertilizer, farm animals and other necessary adjuncts to successful farm operation;

(2) The purchase, repair and replacement of machinery and equipment;

(3) The erection of new buildings and the repair and improvements of buildings used in such industrial or farm operations;

(4) The payment of inmate labor as provided in section 34; and

Mr. C. R. Hardy

(5) All other necessary expenses and costs included in the manufacturing, growing, processing, handling and marketing of articles produced and in the operation and administration of the industrial and farm programs of the division.

"3. The divisions of prison industries and prison farms shall, on or before the fifteenth day of each month, make and enter in proper account books for each industry or farm operation a full and accurate account of all moneys received and expended during the preceding month, on what account received or expended, and shall keep proper vouchers therefor, and shall prepare statements for the director of the department of corrections of each industry and farm operation conducted by the division which shall accurately reflect the financial condition and show the profit or loss of each industry and farm operation for the preceding month. At the end of each fiscal year the divisions shall prepare statements, and submit them to the director of the department, of the financial condition of each industry and farm operation showing the capital assets, current assets including inventory of raw materials, supplies and finished and unfinished products, the amount of sales of articles manufactured, processed or grown, the liabilities, including the amount of depreciation charged off, and the operating costs, including the amount actually paid for inmate labor and the profit or loss accrued to each operation. Any profit or surplus earned shall remain in the working capital revolving fund and shall be paid out only as provided by law. Such information shall be for the use of the director and for inclusion in his report to the governor and general assembly as provided in section 13 of this act.

"4. Said division shall, on or before the tenth day of each month, deposit with the state treasurer all moneys received by them from any contractor or other person, or for any article manufactured, grown, processed or sold for the state, or any money received

Mr. C. R. Hardy

from any other source belonging to the state, taking his receipt. The state treasurer shall take charge of the same and deposit same to the credit of working capital revolving fund and pay it out only for the use, operation, rehabilitation and expansion of the industrial and farm operations of the department.

"5. The penitentiary revolving fund, the penitentiary earnings fund, the intermediate reformatory revolving fund, the intermediate reformatory earnings fund and the convicts' relief fund are hereby abolished and any moneys in these funds on the effective date of this act shall be immediately transferred to the working capital revolving fund."

The new fund, which replaces five previously existing funds, is to be used generally for the same purposes as the funds which it replaces. Sections 217.290 - 217.310, RSMo 1949. In our opinion, for accounting purposes the items about which you inquire should be considered as the newly created Working Capital Revolving Fund. The General Assembly obviously intended that the proceeds of the accounts receivable and inventory of the present Penitentiary Revolving Fund when reduced to cash should be paid into the newly created fund. Therefore, they should now be treated as assets of it.

As for the farm's livestock, paragraph 3 of Section 12 contains the following provision:

"At the end of each fiscal year the divisions shall prepare statements, and submit them to the director of the department, of the financial condition of each industry and farm operation showing the capital assets, current assets including inventory of raw materials, supplies and finished and unfinished products, the amount of sales of articles manufactured, processed or grown, the liabilities, including the amount of depreciation charged off, and the operating costs, including the amount actually paid for inmate labor and the profit or loss accrued to each operation."

In order to gain an accurate picture of the operation of the various farm enterprises, it would be essential to include capital assets on hand at the beginning of the operation of the new fund.

Mr. C. R. Hardy

We consider the failure of the Legislature to make reference to the transfer of such assets to be of no significance inasmuch as their handling is a matter of accounting only. The object of the Legislature was to deal with the handling of money in the fund and they did not purport to define all of the accounting details which would accompany the consolidation of the previously existing funds.

CONCLUSION

Therefore, it is the opinion of this office that assets of the previously existing Penitentiary Revolving Fund consisting of inventories and accounts receivable should be considered assets of the newly established Working Capital Revolving Fund under Section 12 of House Bill No. 377. We are further of the opinion that farm livestock and machinery should also be considered for accounting purposes as assets of said newly established fund.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

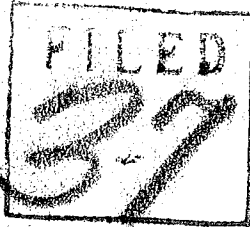
Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

PUBLIC RECORDS:
RECORDER OF DEEDS:
COUNTY COURTS:

Recorder of Deeds has primary responsibility for custody and control of public records in office. Order of county court prohibiting removal of such records from such office is a nullity.



August 1, 1955

Honorable Morran D. Harris
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department which, for the sake of brevity and clarity, we rephrase in the following language:

"Does the county court have the authority to prohibit the recorder of deeds from permitting the temporary withdrawal of public records from the office of such official?"

Under the provisions of Chapter 59, RSMo 1949, the office of Recorder of Deeds in the various counties has been created. Such office is the repository of records relating to title to real property, encumbrances upon real property, marriage licenses issued and numerous similar documents having the characteristics of being related to matters of public concern. That such records so required to be kept are of a "public" or "official" nature appears rather clear from what was said by our Supreme Court in *State ex rel. Kavanaugh v. Henderson*, 169 S. W. (2d) 389, wherein that court made the following observations, 1. c. 392:

"In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; *Clement v. Graham*, 78 Vt. 290, 63 A. 146. Ann.Cas. 1913E, 1208; *Robison v. Fishback*, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann. Cas. 1913B, 1271;

Honorable Morran D. Harris

State ex rel. Eggers v. Brown, 345
Mo. 430, 134 S. W. 2d 28."

Having determined the nature of such records it becomes pertinent to determine the proper official who may exercise control over their safekeeping and usage. The general rule is stated thusly in 76 C.J.S., "Records" page 132, paragraph 34, reading in part as follows:

"A public officer, by virtue of his office, is the legal custodian of all papers, books, and records pertaining to his office, and is responsible for their safekeeping and protection against alteration, injury, or mutilation, and for their delivery to his successor. Correlative with that duty is his right to exercise a reasonable discretion in the care, management, and control of such records and their preservation."

It appears from the foregoing, when read in the light of statutes applicable to the office of Recorder of Deeds, that such public official comes within the purview of the rule of law quoted supra. Narrowing our research into the law as it may be applicable to the particular problem you have proposed, we note the following further rule found in the same volume at page 147, paragraph 39, which reads in part as follows:

"It has been stated that private individuals have no right to remove public records or papers from the office or files where they belong; and when permission to do so is granted it is a matter of favor and not of right. A practice of removing a public record leads to confusion and delay besides the possibility of the loss of the record and should not ordinarily

Honorable Morran D. Harris

be permitted." (Emphasis ours)

We deem it pertinent to observe that while the authority to permit withdrawal of public records appears to be inherent, yet in the light of the emphasized portion of the rule quoted it appears to be a practice not to be encouraged. Even more strongly, in *Sternberger v. McSween*, 14 S. C. 35, that court specifically held that judicial sanction should not be given nor could not be given to such practice.

We find no cases reported in the appellate courts of Missouri passing upon the precise question of the superiority of the right of control and custody of public records as between the official having charge thereof and a body such as the county court. However, in *Babcock v. Hahn*, reported 175 Mo. 136, there is an implied recognition of the right of the Recorder of Deeds to exercise superior authority over the public records committed to his care. In that case the Recorder of Deeds of the City of St. Louis proposed to remove his office from the established courthouse to another public building. The plaintiff in the suit, a taxpayer and citizen of the city of St. Louis, sought to enjoin the change in location of the office. The primary question, of course, involved was whether the contemplated place of removal fell within the meaning of the phrase "seat of justice" as that term was used with reference to the situs where such office should be maintained. The court held that the proposed new location was within the area included in the phrase and upheld the right of the official to make such change.

We are not unmindful of the case also decided by the Supreme Court of Missouri, styled the *State ex rel. Powell et al. v. Shocklee et al.*, reported 237 Mo. 460. In that case the county court had ordered the removal of the office of Recorder of Deeds from Danville, in Montgomery County, to Montgomery City, in the same county. Such action was taken under a statute authorizing county courts in counties wherein no courthouse or other suitable county building was available at the seat of justice to provide office facilities for the Recorder of Deeds at some other place in the county where there might be a courthouse and courts of record held sessions. This action of the county court was upheld. However, it will

Honorable Morran D. Harris

be observed that in that instance the county court merely ordered the relocation of the office which, while necessarily also requiring the removal of the public records to the new location, did not purport to attempt to extend or impose the authority of the county court over the public records themselves. Therefore, it cannot be said that this case is authority contrary to the general rules quoted, supra, and with which we are in accord.

CONCLUSION

In the premises we are of the opinion that the Recorder of Deeds has the primary responsibility for the custody, control and safekeeping of public records in his office and may permit the temporary withdrawal of such records to persons, and for reasons, determined by such official to be proper, subject to the requirement that such official is liable upon his official bond for damages which may be occasioned thereby.

It is our further opinion that the practice of permitting the withdrawal of such public records is not one to be encouraged because of the public inconvenience and confusion which may result therefrom, but that the county court has no authority to unequivocally by order of record prohibit such withdrawal.

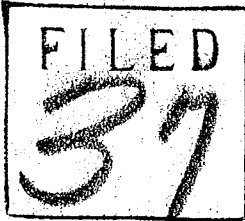
The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours

John M. Dalton
Attorney General

WFB,Jr:lc

STATE PENITENTIARY:
INTERMEDIATE REFORMATORY:
STATE BOARD OF TRAINING
SCHOOLS:



Mr. C. R. Hardy
Auditor, Division of
Penal Institutions
Department of Corrections
Jefferson City, Missouri

Intermediate Reformatory cannot purchase foods for the state penitentiary commissary in lieu of payments for bread obtained from the penitentiary bakery; Board of Training Schools cannot purchase foods for the penitentiary commissary in lieu of payments on account of transfer of inmates to the state penitentiary; state penitentiary should continue to make said charges, the former to be deposited to the credit of the Working Capital Revolving Fund and the latter to the credit of general revenue.

September 6, 1955

Dear Sir:

Reference is made to your request for an official opinion, which request reads as follows:

"Since House Bill No. 377, passed by the Sixty-eighth General Assembly, abolished the Earnings Fund of the state penitentiary and the Earnings Fund of the Intermediate Reformatory, we are confronted with the following problems.

"The state penitentiary in the past several years has furnished bread from the penitentiary bakery to the Intermediate Reformatory which made payments regularly for the amount of its purchases to the Division of Penal Institutions and the payments received by the penitentiary were placed in the Earnings Fund of the Division of Penal Institutions and used for operational purposes.

"The Board of Training Schools has certain of its inmates, who are considered incorrigibles, transferred to the Intermediate Reformatory and the state penitentiary. The Board of Training Schools has consistently paid \$45 per quarter for each inmate transferred and the amounts credited to the Intermediate Reformatory Earnings Fund and the penitentiary Earnings Fund. There are other similar charges and payments which have heretofore been handled through the Earnings Fund of the penitentiary and the reformatory.

Mr. C. R. Hardy

"Since the penitentiary and the Intermediate Reformatory, exclusive of the farms which now come under the Working Capital Revolving Fund, shall operate exclusively from Revenue appropriations would the Intermediate Reformatory be permitted to purchase foods for the penitentiary commissary equal to the amount of bread purchased by the Intermediate Reformatory from the penitentiary?

"Would the Board of Training Schools be permitted to purchase foods for the Missouri penitentiary commissary sufficient to off-set the quarterly payments due from the Training Schools for the inmates transferred to the Intermediate Reformatory and to the Missouri penitentiary?

"If purchases of food from the departments for the penitentiary commissary are not permitted should the penitentiary continue the charge for bread furnished the Intermediate Reformatory and inmates transferred from the Board of Training Schools and collect for such items and turn the proceeds to the State Treasurer for credit to Revenue Fund?"

You first state that the penitentiary furnishes bread from the penitentiary bakery to the Intermediate Reformatory, which institution makes payments regularly for the amount of the purchases to the Division of Penal Institutions, and inquire whether in lieu of such payments the Intermediate Reformatory could purchase foods for the Missouri penitentiary commissary sufficient to offset payments due.

House Bill No. 377, enacted by the Sixty-eighth General Assembly, to which you refer, was signed by the Governor on July 14, 1955. It contains an emergency clause and, therefore, became effective on that date. Said bill does, as you state, abolish the penitentiary revolving fund and the penitentiary earnings fund, and creates a "Working Capital Revolving Fund," in the following language:

"Section 12. 5. The penitentiary revolving fund, the penitentiary earnings fund, the intermediate reformatory revolving fund, the intermediate reformatory earnings fund and the convicts' relief fund are hereby abolished and any moneys in these funds on the effective date of this act shall be immediately transferred to the working capital revolving fund."

Mr. C. R. Hardy

Section 12, paragraph 1, of said bill, provides that the gross or total receipts and income of all industrial operations of the institutions within the Department of Corrections shall be deposited in the state treasury to the credit of the "Working Capital Revolving Fund," said paragraph reads as follows:

"Section 12. 1. The gross or total receipts and income of all industrial and farm operations of the institutions within the department of corrections shall be paid into the state treasury and credited to the 'Working Capital Revolving Fund', which is hereby created."

Section 12, paragraph 2, provides that said fund shall be used only for certain purposes, as follows:

"The working capital revolving fund shall be used only for the establishment, maintenance, rehabilitation, expansion and operation of the prison industrial and farm programs and may be expended for:

"(1) The purchase of raw materials to be manufactured, processed or grown, including seed, fertilizer, farm animals and other necessary adjuncts to successful farm operation;

"(2) The purchase, repair and replacement of machinery and equipment;

"(3) The erection of new buildings and the repair and improvements of buildings used in such industrial or farm operations;

"(4) The payment of inmate labor as provided in section 34; and

"(5) All other necessary expenses and costs included in the manufacturing, growing, processing, handling and marketing of articles produced in the operation and administration of the industrial and farm programs of the division."

In view of these provisions of the act, we are of the opinion that the Intermediate Reformatory cannot purchase foods for the penitentiary commissary in lieu of payments for bread obtained from the penitentiary bakery. Gross or total receipts or income derived from the sale of bakery products would, of course, be receipts or income derived from

Mr. C. R. Hardy

an industry of an institution of the department as contemplated by Section 12, supra, which receipts or income are required to be placed in the state treasury to the credit of the "Working Capital Revolving Fund," and used only for the purposes specified. To sanction a procedure or transaction such as you have suggested would be to permit such receipts or income to be used for operations of the institution, which matter the General Assembly has seen fit to sustain by appropriations from the general revenue rather than from the earnings of the various industries of the department. Further, we find no authority for one institution to use its appropriated funds to make purchases for another institution, which matters are covered by a separate appropriation.

You next state that the Board of Training Schools has certain of its inmates, who are considered incorrigibles, transferred to the state penitentiary and, likewise, inquire whether the Board can purchase foods for the Missouri penitentiary commissary in lieu of payments which the Board makes for each inmate transferred to the penitentiary.

We wish to note that Section 219.230, RSMo 1949, authorizes the Board of Training Schools, subject to the approval of the Governor, to transfer any person committed to its custody to a state adult correctional institution. Section 219.260, RSMo 1949, authorizes the Board of Training Schools, upon requisition of the institution to whom custody of the child is transferred, to pay to such institution certain moneys. Said section provides, in part, as follows:

"* * *In the event of a transfer of any child under the provisions of section 219.230, the board shall, on requisition of the institution or agency to whom custody of said child is transferred, pay to such agency or institution the amounts paid to it under this section and section 219.270 for the period of such transfer."

In view of this statutory provision, we are of the opinion that such payments are to be made in cash as received, rather than in another medium. What has heretofore been said in regard to the Intermediate Reformatory making purchases of foods for the state penitentiary from its appropriated funds would, likewise, apply to the State Board of Training Schools, if appropriated funds are used in making payments to the state penitentiary on account of inmates transferred.

Mr. C. R. Hardy

CONCLUSION

Therefore, it is the opinion of this office that the Intermediate Reformatory cannot purchase foods for the state penitentiary commissary in lieu of payments for bread obtained from the penitentiary bakery nor can the Board of Training Schools purchase foods for the penitentiary commissary in lieu of payments as authorized by law to the state penitentiary on account of inmates transferred to said penitentiary.

We are further of the opinion that the state penitentiary should continue making charges for bread supplied to the Intermediate Reformatory and to requisition payments from the Board of Training Schools on account of inmates transferred to said penitentiary. The former payments to be deposited in the state treasury to the credit of "Working Capital Revolving Fund" and the latter to the credit of general revenue.

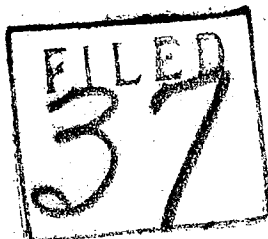
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

CHIROPODIST:
UNPROFESSIONAL
CONDUCT:
ADVERTISING:

As used in the statutes concerning revocation of licenses "unprofessional conduct" is convertible with "dishonorable."
The State Board of Chiropractic may revoke for immoral or dishonorable advertising only.



November 21, 1955

L. A. Hansen, D.S.C.
Secretary
Missouri State Board of Chiropractic
800 Professional Building
Kansas City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"As Secretary of the Missouri State Board of Chiropractic, I should like to get an official opinion as to whether or not the Missouri State Board of Chiropractic can revoke or suspend a chiropractor's license for unprofessional conduct."

We fail to find any instances in the Missouri cases in which the term "unprofessional conduct" alone has been defined. It has arisen in association with other words as "unprofessional and dishonorable conduct," "unprofessional or dishonorable conduct," and "other unprofessional conduct," etc. Your question seems to be predicated upon a doubt as to the clarity and the definition of the term. Is it too vague, ambiguous and indefinite? It is noted that the chapter on Chiropractors is the only one among the chapters regulating the professions, such as law, medicine and medicine's allied professions, that uses such a term by itself as grounds for the revocation of a license.

In all the cases that we have found in which "unprofessional conduct" has been used along with other words or phrases, the courts have held that the terms were not too indefinite; that it is within the police power of the state to specify the grounds for revocation in such broad terms; that the legislature is not required to define with particularity the acts which constitute "unprofessional conduct."

In the case of Hughes v. State Board of Health, 159 S.W. (2d) 277, the court said:

L. A. Hansen, D.S.C.

"We have held such specific enumeration does not thereby exclude other acts indicative of unprofessional or dishonorable conduct not mentioned in the statute. Any conduct, although not specified, which by common opinion and fair judgment is determined to be unprofessional or dishonorable, may constitute grounds of revocation. State ex rel. Lentine v. State Board of Health, 334 Mo. 220, 65 S. W. 2d 943."

In the Lentine case the court had further said:

"Reference should be had to the policy adopted by the legislature in reference to the subject-matter, the object of the statute, and the mischief it strikes at or seeks to prevent, as well as the remedy provided. Looking to the policy and object of our Medical Practice Act as a whole, we find it to be an exercise of the inherent police power of the state in the protection of its people attempting to secure to the people the services of competent practitioners learned and skilled in the science of medicine, of good moral character and honorable and reputable in professional conduct. * * *"

The court further said:

"It would not be practicable to the carrying out of the wholesome purpose of the statute to undertake to catalogue, list, or specify each and every act or course of conduct which would, or under what circumstances, constitute bad moral character or unprofessional and dishonorable conduct, and we do not think the Legislature intended to do so. * * *"

In the case of Pierstorff v. Board of Embalmers, etc.,

L. A. Hansen, D.S.D.

an Ohio case, in 41 N. E. (2d) 889, the court said:

"The great weight of authority, and what we consider the better reasoned discussions bearing directly upon the question here involved, support the view that the statute involved in this case is not void and ineffective because it does not define the term 'unprofessional conduct,' nor is the board without power to revoke a license because it has not set up standards with reference to that term."

In the latter case the statute provided that a license might be revoked, "if the holder thereof has been guilty of immoral or unprofessional conduct."

In the Colorado case of Sapero v. State Board of Medical Examiners, 11 P. (2d) 555, a statute which used the words as a grounds for revocation, "immoral, unprofessional or dishonorable conduct," was in question. The court said:

"A physician's license cannot be revoked merely for violating professional ethics or the rules of a board of health; to be actionable, it must amount to a breach of law. (State Board of Dental Examiners v. Savelle, 8 P.(2d) 693; Chenoweth v. State Board of Medical Examiners, 141 P. 132; Aiton v. Board of Medical Examiners, 114 P.962.) The term 'unprofessional' is convertible with 'dishonorable,' in the common use of the word, and considered as dishonorable in the common judgment of mankind. Id. Comparing law with medicine, we know of no reported case where an attorney has been disbarred or disciplined by the court that its action would not be approved by an enlightened public conscience."

The court had earlier in the Sapero case stated:

L. A. Hansen, D.S.C.

"Manifestly, it was impossible as well as unnecessary for the General Assembly to anticipate all evil deeds that the words 'immoral, unprofessional or dishonorable' were intended to cover; hence the wisdom of looking to the usual definition of such words, or 'the common judgment of mankind', for a standard of construction. It crystallizes the statute into a definite meaning that all who read should be able to comprehend. * * * "

Thus, we see in practically all of the cases that the courts have used "unprofessional" along with the words immoral, unlawful, or dishonorable, they seemingly have categorized unprofessional with such other adjectives.

We do find, in a few cases, as in the case of Board of Education of City of Los Angeles v. Swan, 261 P. (2d) 261, the court saying that "unprofessional conduct" is that which violates the rules or ethical code of a profession, or such conduct which is unbecoming a member of a profession in good standing. However, in none of the cases we have found, which indicate that unprofessional conduct might be a mere violation of an ethical code of a profession, was the question of a complete revocation of a license invalid. In the Swan case, for instance, the question was merely one regarding the dismissal of a teacher from a public school system. It is submitted that there is a tremendous difference between one being "fired" from a job and one having his license to practice or teach any place else in the state completely revoked.

We therefore conclude that the courts of Missouri would not hold the term "unprofessional conduct" too indefinite, even though this is apparently the only instance in which it is used by itself. In view of the fact that the purpose of the Chiropractist statute is approximately the same as the purpose of the statute governing the practice of medicine and surgery, we are impelled to the belief that the courts would hold the term "unprofessional conduct" to be synonymous with dishonorable, even when the statute does not specifically associate the two words.

L. A. Hansen, D.S.C.

We come now to your oral question which, on your recent visit to the Attorney General's office, you stated as follows: "If the Board, in its rules and regulations defines advertising as unprofessional instead of as merely unethical as it has previously done, can the Board revoke a chiropodist's license when one is found guilty of advertising."

In addition to that we will consider another matter about which you do not specifically ask. Enclosed with your recent inquiry was a proposed change in your "Standard of Proficiency and your Rules and Regulations." After enumerating in Article III the grounds for revocation by a verbatim quotation of the statute, which is Section 330.160 as amended by Laws of 1951, page 730, you list numerous examples of unprofessional conduct, one of which is the following:

"It is unprofessional to advertise directly or indirectly by radio, in newspapers, telephone directory, magazines, or periodicals, in bold face type in any printed matter, or by electric display signs, or advertising directly or indirectly prices for professional service in any printed matter or on any signs used. All listing in directories of any sort shall be uniform. No practitioner may have any part of his listing printed in any manner that will make such listing distinct from that of his fellow practitioners and under any other listing than chiropodist."

It is our understanding you desire to know if such a definition will stand a test in court following an action of revocation.

These questions arise because of the Attorney General's opinion of the 14th of December, 1954, to you, holding that the fact that since advertising was only a violation of the Board's code of ethics a license could not be revoked on the grounds of unprofessional conduct.

As pointed out above, the courts have adopted a statutory definition for unprofessional (as it applies to sus-

L. A. Hansen, D.S.C.

pensions and revocations) different from the dictionary definition. They have made it synonymous or convertible with dishonorable.

Because of the language of the cases, we are of the opinion that the courts have not used "unprofessional" conduct as convertible with "dishonorable" conduct merely because of the statutory associations of such terms.

The courts have always maintained their over-riding conviction that so serious an action as the withdrawal of one's best means of earning his livelihood should not be taken for some vague, light or airy reason, but for only some cogent, strong and compelling reason. It is believed that the courts would not permit a state board of some profession to declare something to be unprofessional that the legislature had not and the courts in their interpretation of legislation had not.

Since the Board has not been granted, nor can it be granted, legislative authority, any advertising which could justify a revocation would have to be of a kind that tends to deceive, or to mislead, or in some manner carry the stigma of unprofessional because of being immoral or dishonorable.

CONCLUSION

We conclude, therefore, that the State Board of Chiropractic can revoke or suspend a chiropractor's license for "unprofessional conduct" even though the statute does not define the term.

We further conclude that the State Board of Chiropractic has no authority to declare all advertising to be unprofessional conduct nor authority to revoke a chiropractor's license on such grounds except for such advertising as can be deemed to be unprofessional because it is immoral or dishonorable.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

CONVICTS: Convict who escapes from Church Farm may be
deprived of three-fourths rule and required
PENITENTIARY: to serve full sentence.

December 19, 1955

FILED
37

Honorable C. D. Hamilton
Member, House of Representatives
New London, Missouri

Dear Mr. Hamilton:

This is in response to your request for opinion dated
November 19, 1955, which reads as follows:

"Everett Ayers, Register No. 59698 has
written to me about what the law declares
on 12/12ths time.

"He was received at the Missouri prison on
October 9, 1946 to serve two four year sen-
tences to run concurrently, charges Forgery
2nd (2 chgs.) He was paroled December 7,
1948 and was returned as a parole violator
March 23, 1954. Revocation of parole came
about because of commission of another felony.
On March 2, 1949 he was sentenced to serve
ten years for forgery in the State Penitentiary
at Ft. Madison, Iowa. He was released March
23, 1954 and returned here to complete the
sentence.

"On July 2, 1954 he appeared before the
Classification Committee and was approved
for Church Farm assignment. On July 18,
1954 he escaped and was not returned to the
custody of the prison until October 14, 1954.

"He is presently serving his sentence 12/12ths
and will remain on that status until pending
'Escape' charge is disposed of.

"What I want to know is: under the law is the
12/12ths time legal?"

Your question involves a construction of Section 216.355,
RSMo Cum. Supp. 1955, which reads in part as follows:

Honorable C. D. Hamilton

"1. Any person who is now or may hereafter be confined in any institution within the division and who shall serve three-fourths of the time for which he was sentenced in an orderly and peaceable manner, without having any infraction of the rules or laws of the institution recorded against him, shall be discharged in the same manner as if he had served the full time for which sentenced. In such case no pardon from the governor shall be required."

In Ex parte Rody, 348 Mo. 1, 152 SW2d 657, the court construed Section 9086, R. S. Mo. 1939, which, as applicable to the problem under consideration, was the same as Section 216.355, supra. The facts of that case were as follows: The convict applying for habeas corpus was convicted of the offense of robbery on January 9, 1937, and sentenced to five years in the penitentiary. In October, 1938, while being transferred to a sawmill camp operated by the penitentiary in Callaway County, and under guard, petitioner fled and escaped apprehension for three days, said escape being recorded in the prison records. Petitioner contended that he was entitled to discharge under Section 9086, R.S. Mo. 1939 (Sec. 216.355, supra), but the warden contended that the escape from the prison sawmill deprived petitioner of the benefit of the three-fourths rule.

Section 4307, R.S. Mo. 1939 (Sec. 557.360, RSMo 1949), provided then, as now, that:

"If any person confined in the penitentiary for any term less than life shall escape from such prison, or, being out under guard, shall escape from the custody of the officers, he shall be liable to the punishment imposed for breaking prison."

This section was held applicable in that case.

On this point, the Rody case was cited in State v. Baker, 355 Mo. 1048, 199 SW2d 393, 395, where the court said:

"State prison farms are part and parcel of the penitentiary. The escape of a prisoner from a state prison farm is an offense prohibited by and punishable under the statute in question, Sec. 4307, R.S. Mo. 1939, Mo. R.S.A. State v. Betterton, 317 Mo. 307, 295 S.W. 545; Ex parte Rody, 348 Mo. 1, 152 S.W. 2d 657."

Honorable C. D. Hamilton

In the Rody case the court considered the various contentions made by the petitioner and held in essence that Section 557.360, RSMo 1949 (Sec. 4307, R.S. Mo. 1939), is a law governing the inmates of the penitentiary within the meaning of Section 216.355, supra (Sec. 9086, R.S. Mo. 1939), that the conditions of the three-fourths rule which must be read into every judgment of conviction offer a reward in the form of diminished incarceration to every convict for obedience to the rules of the prison and the laws of the same. It was further held that the enforcement of these rules and laws, so far as they affect the reward of diminished incarceration, is administrative and not judicial. The court held that because of the escape petitioner was not entitled to the benefit of the three-fourths rule and ordered him remanded to the custody of the warden.

In short, the three-fourths rule provides a reduction in the amount of time which a prisoner must spend in the penitentiary, provided he serves three-fourths of his sentence in a peaceable manner, without having any infraction of the rules of the prison or law of the same recorded against him. Conversely, if any infraction of the rules of the prison or law of the same is recorded against him, he loses the benefit of the rule. Since the prisoner in question escaped from Church Farm, which has been held to be an infraction of a law of the prison, he has lost the benefit of the three-fourths rule and may be required by the proper administrative officials of the prison to serve the full time for which he was sentenced.

CONCLUSION

It is the opinion of this office that a prisoner in the Missouri State Penitentiary who is assigned to Church Farm and who escapes therefrom may be deprived of the benefit of the three-fourths rule and required to serve the full time for which he was sentenced.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

John M. Dalton
Attorney General

JWI:ml:hw

PROBATE JUDGES: Judges of probate courts and clerks of such
PROBATE CLERKS: courts are neither required nor permitted to
prepare pleadings for presentation to such
courts in connection with the administration
of estates of deceased persons.

February 10, 1955



Hon. William J. Hensley
Prosecuting Attorney
Johnson County
Johnson County Courthouse
Warrensburg, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"This office respectfully request your opinion
on the following two questions:

"1. Does the judge or clerk of the Probate
Court have the duty to prepare applications
for letters testamentary, letters of admin-
istration and applications for orders of
court; and/or any other papers or pleadings
that are necessary to complete the adminis-
tration of an estate?

"2. If the judge or clerk does not have the
duty to prepare the above mentioned papers
then are they prohibited from doing so?

* * * * *

Probate courts are courts of record pursuant to the pro-
visions of Article V, Section 17 of the Constitution of Missouri,
1945, which reads as follows:

"Probate courts shall be courts of record
and uniform in their organization, juris-
diction and practice, except that a separate
clerk may be provided for, or the judge may
be required to act ex officio as his own
clerk."

Hon. William J. Hensley

Similar statutory declarations with respect to the status of such courts appear in Sections 476.010 and 481.010, RSMo 1949, which sections, in the interest of brevity, are not quoted verbatim herein. Another constitutional provision is also pertinent to your inquiry, we believe, it appearing as Article V, Section 24, which reads in part as follows:

" * * * No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. * * *" (Emphasis ours.)

We further direct your attention to the provisions of Section 476.290, RSMo 1949, which reads as follows:

"No judge of any court of record shall practice or act as counselor or attorney in any court within this state nor shall any clerk or deputy clerk, while he continues to act as such, plead, practice or act as counselor or attorney in any court within the county for which he is such clerk or deputy clerk, in his own name or in the name of any other person, under any pretense whatever."
(Emphasis ours.)

We also direct your attention to Section 476.300, providing a penalty for the last quoted statute, and Section 476.310, which reads as follows:

"No judge, magistrate, clerk or deputy clerk of any court shall have any partner practicing in the court of which he is judge or magistrate, clerk or deputy clerk."

One additional statute relating to practice in probate courts we believe to be germane to the subject of your inquiry. It appears as Section 484.030, RSMo 1949, and reads, in part, as follows:

"1. No person whomsoever shall practice in the probate court, it being a court of record, other than a regular, licensed, practicing and reputable attorney, so

Hon. William J. Hensley

authorized in this state; and no person shall receive any pay nor compensation for any legal service, for making settlements, annual or final, filing petitions or other documents in any estate, other than such regularly licensed attorney, and no probate court shall allow nor permit any pay or fee for any such services to any person, to be taxed, in any estate, other than to a reputable attorney, either directly or indirectly, for any purpose. Nor shall any administrator or executor or guardian employ or pay to any such person other than an attorney." (Emphasis ours.)

The foregoing evidences a public policy exemplified by both constitutional and statutory enactments prohibiting judges and clerks of courts of record from either doing a law business or practicing law in the courts of which they are officers. The terms "practice of law" and "law business," appearing in both the Constitution and statutes, are defined in Section 484.010, RSMo 1949, which reads as follows:

"1. The 'practice of the law' is hereby defined to be be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

"2. The 'law business' is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to

Hon. William J. Hensley

obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

The general prohibition against persons engaging in such practices without having been licensed as attorneys at law appears in Section 484.020, which reads, in part, as follows:

"1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association or corporation engage in the practice of the law or do law business as defined in section 484.010, or both."

The preparation of applications for letters testamentary, letters of administration, and the various other pleadings incident to the administration of an estate, are within the definition of the terms "practice of law" and "law business" as these terms have been defined by statute. Therefore, we are constrained to the belief that the General Assembly has surrounded the administration of estates in the probate courts with a prohibition depriving the judges and clerks of such courts of either the duty to prepare such pleadings or the right to do so. Such a public policy is in accord with that of the State of Missouri in relation to other courts of record, in that it removes from the judges of such courts the power to pass upon the sufficiency, legality and validity of pleadings filed in such court prepared by the judge or clerk thereof.

CONCLUSION

In the premises, we are of the opinion that neither the judge of a probate court nor the clerk thereof has the duty to prepare pleadings for filing in such court in connection with the administration of the estate of a deceased person.

We are further of the opinion that neither such judge nor such clerk may prepare such pleadings, for the reason that such officers are prohibited therefrom by constitutional or statutory provisions, or both.

Hon. William J. Hensley

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

MINING LAWS OF MISSOURI:
COMPLIANCE THEREWITH, BY WHOM:

Operators of sand and gravel
pits are not required to con-
form to the mining laws of
Missouri.

FILED

39

October 24, 1955

Honorable Floyd E. Henson, Director
Division of Mine Inspection
Capitol Building
Jefferson City, Missouri

Dear Mr. Henson:

This is the opinion you requested as to whether the sand and gravel operators are subject to and required to conform to the mining laws of Missouri. Your request states:

"I would like an opinion from your office regarding Sand and Gravel Operators who derive their entire production from Streams by dredging or other methods.

"It is my feeling that since these Operators do no blasting and do not use loading machinery such as power shovels and trucks in collecting this material they should not be compelled to conform to the Mining Laws of Missouri.

"Some of these operators have objected to being classed as Mine Operators and I am inclined to agree with them. I feel theirs is a dredging operation, rather than Mining.

"I am prepared to exempt these Operators from having to comply with our Mining Laws. However, I would appreciate a ruling from your Office before taking this action."

Chapter 293, RSMo 1949, contains the sections of the statutes in this state relating to the subject of mining. Said Chapter 293, in none of the sections thereof, defines the terms "mine" or "mining." Although the business of a mine or the enterprise of mining are not defined in said Chapter 293, it is apparent that such statutes, in their pro-

Honorable Floyd E. Henson

visions, scope or intent are not designed to and do not apply to operators of gravel pits or the production of sand and gravel as those subjects are noted and referred to in the request. There is no provision or requirement in any of the sections of said Chapter 293 requiring the operators of a sand and gravel business to conform to the mining laws of Missouri in any manner whatsoever.

CONCLUSION

Considering the premises, it is the opinion of this office that the operators of sand and gravel pits or a sand and gravel business are not subject to and are not required to conform to the mining laws of this state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Crowley.

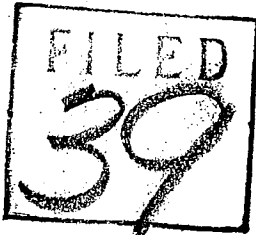
Very truly yours

John M. Dalton
Attorney General

GWC:lc

**INSANITY PROCEEDINGS:
COSTS:**

Costs in all probate insanity proceedings under Senate Bill 59 and House Bill 30, passed by the 68th General Assembly, such bills, as sections, and other sections on the same subject considered herein being in pari materia, must be paid by the county involved if the estate of the subject of the inquiry, if adjudged to be of unsound mind, is insufficient to pay such costs.



December 16, 1955

**Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri**

Dear Mr. Henson:

This opinion is rendered by this office in response to your request which reads as follows:

"The Probate Judge and I are having trouble in determining the course of procedure we are to follow in committing patients to the State Mental Hospital as wards of the county under the provisions of Senate Bill No. 59 passed by the 68th General Assembly.

"I have not examined this Senate Bill personally but I am informed by the Probate Judge that Section 202.150, Revised Statutes of Missouri, 1949, pertaining to the appointment and payment of an attorney for an insane person and Section 202.160, pertaining to the payment of costs by the county for an insane person have both been repealed and that the new law as set out in Senate Bill No. 59 does not provide for the payment of an attorney to represent an indigent person and does not provide for the payment of the costs. He also pointed out that Senate Bill No. 59 provides for the appointment of a special commissioner to assist in the conduct of hospitalization proceedings but the bill is silent as to his qualifications and compensation.

"We also note that the bill makes no provision for the payment of the physicians to be appointed by the Court, and we are wondering if a Court order directed to two

Honorable Rex A. Henson

physicians to make the examination of the patient is intended to force an examination by a physician without compensation.

"We would appreciate your opinion as to our course of procedure with respect to these questions."

Your request indicates that the question has arisen before the probate judge of your county as to the procedure to be followed in committing indigent patients adjudged to be of unsound mind to a state mental hospital as wards of the county, under the provisions of Senate Bill No. 59 passed by the Sixty-eighth General Assembly.

The request includes also various questions to be here considered and answered, such as the appointment and compensation of counsel for an indigent subject of an inquiry as to his competency, the payment of the costs of such proceedings, the appointment by the probate court of a special commissioner to assist in the conduct of the hospitalization proceedings. Senate Bill No. 59 provides in certain of its sections that if an application questioning an indigent person's insanity and requesting hospitalization for such person is referred by the court to the special commissioner he shall cause a prompt examination to be had of the proposed patient by two physicians. If their report is that the patient is not mentally ill the court may terminate the proceedings without further effort and dismiss the application; otherwise, the court shall fix a date for and give notice of a hearing to be held not less than five days nor more than fifteen days from the receipt of the report.

The proposed patient, the applicants, and all other persons entitled to notice shall be offered an opportunity to appear at the hearing and may present and cross-examine witnesses, and the court may, in its discretion, hear the testimony of any other person. Upon the completion of the hearing, and considering the record, if the court finds that the proposed patient is mentally ill and in need of custody, care or treatment in a mental hospital and lacks sufficient capacity because of his illness to make needful decisions concerning his hospitalization the court may make an order for temporary confinement for a period not exceeding six months for hospital observation, or for an indeterminate period; otherwise, the court shall dismiss the proceeding.

Many of these provisions are of the terms appearing in Senate Bill No. 59. They are elements of the procedure necessary to be

Honorable Rex A. Henson

followed in approaching and carrying on the process of an inquisition as to any person's soundness or unsoundness of mind and pointing to his hospitalization. Other matters relating to the procedure in such a case and also relating to the subject, will be considered as we proceed.

The question of whether or not Senate Bill No. 59 provides adequate authority for the appointment of counsel for the person alleged to be insane, and the allowance of a fee to such counsel by the court, the payment of the costs of such a proceeding, the authority of the court to appoint and allow compensation to him for his services as special commissioner, and the appointment of and allowance of reasonable compensation to two licensed physicians to examine the proposed patient and report thereon as to his mental condition, all appear to be matters of doubt and uncertainty to the probate judge under the terms of said Senate Bill No. 59 since, as the request states, only some of such matters being expressly named or provided for in said Senate Bill No. 59.

The request also indicates that the matter of uncertainty as to the procedure to be followed in such cases is attributable to the repeal of Sections 202.150 and 202.160, RSMo 1949, and that Senate Bill No. 59 has no provision therein for the payment of such counsel nor the costs of the proceeding, and does not provide for the payment of the compensation of a special commissioner nor for the two physicians, the appointment of whom is authorized by said Senate Bill No. 59.

Sections 202.150 and 202.160, as existing statutes before their repeal, were statutes relating to proceedings followed in a jury trial in probate court and referring to the appointment of counsel for the subject and his fees, and the payment of the costs of the proceedings by the county on the question of insanity or mental incompetency of an indigent person. Senate Bill No. 59 is an act of the General Assembly on the same subject. There are various details to be observed in the proceedings by which a case of competency or incompetency of a person is to be determined, but they all stem from the same subject - insanity or unsoundness of mind. That is the subject upon which the General Assembly was legislating in the enactment of all statutes we are here considering. Such statutes, expressing the intent of the legislature in their enactment, had but one objective, that is, to judicially say whether a named person is of sound or unsound mind.

In conjunction with the consideration to be given Senate Bill No. 59 in disposing of the questions arising here, due consideration must be given to the sections of House Bill 30 and

Honorable Rex A. Henson

other sections relating to procedure in such cases. They all have an equal relationship to the subject and to each other and possess a like measure of authority and responsibility for the accomplishment of their joint purpose to provide for such a hearing under all of such statutes.

It is the view of this office that the terms of the two bills and other statutes noted may be readily reconciled with each other and construed to have the effect of one law, because said Senate Bill No. 59 and House Bill 30 and such other statutes so noted all relate to the same subject of insanity. The terms of the two separate bills now appear as independent sections one, (Senate Bill No. 59) in Vernon's Annotated Missouri Statutes, 1955, and the other (House Bill 30) in the new probate code. The provisions of both bills in their proper places treat of and refer to the hearings and all necessary proceedings incident thereto in sanity cases of all kinds. Whatever the purpose and object of such hearing may be, whether for guardianship or simply regarding the subject of incompetency generally, they all are germane to the subject of insanity and should be considered as one law in relation thereto.

The provisions of Senate Bill No. 59, in subsection 6 thereof, now subsection 6 of Section 202.807, Vernon's Annotated Missouri Statutes, 1955, and the provisions of House Bill 30 (Sections 297 and 299 of the new Probate Code), (Section 475.085, V.A.M.S., 1955), and Section 475.075 (V.A.M.S., 1955), are all in pari materia with each other as such provisions apply to the subject of notice, hearings, and responsibility for payment of compensation of counsel appointed by the court for indigents in insanity and guardianship proceedings, and payment of compensation of two licensed physicians to examine the proposed patient in the matter then in probate courts. Section 475.075, on the question of hearings in incompetency, referring to the requirements incident thereto of notice, service thereof and appointment of counsel for the subject of the inquiry, reads as follows:

"Hearing on incompetency - notice - service
- appointment of attorney

"1. When a petition for the appointment of a guardian for an alleged incompetent is filed, the court, if satisfied that there is good cause for the exercise of its jurisdiction, shall order that the facts be inquired into by a jury, except that if neither petitioner nor the alleged incompetent demands a jury, the facts may be inquired into by the court.

Honorable Rex A. Henson

"2. The alleged incompetent shall be notified of the proceeding by written notice stating the nature of the proceeding, time and place when the proceeding will be heard by the court, and that such person is entitled to be present at the hearing and to be assisted by counsel. The notice shall be signed by the judge or clerk of the court under the seal of the court, and served in person on the alleged incompetent a reasonable time before the date set for the hearing. Notice shall also be given the spouse of the alleged incompetent in the manner prescribed by section 472.100, RSMo, if directed by the court.

"3. If no licensed attorney appears for the alleged incompetent at the hearing the court shall appoint an attorney to represent him in the proceeding, and shall allow a reasonable attorney fee for the services rendered, to be taxed as costs in the proceeding. (L. 1955, p.____, H.B. No. 30, sec. 297.)"

Section 458.060, RSMo 1949, providing the procedure to be followed incident to a hearing and the adjudication of a subject's sanity and the appointment of a guardian for him, if found to be incompetent, is in almost the exact terms as are the terms of Section 475.075, supra, on strictly regular insanity proceedings in any case of insanity considered alone.

Section 475.085, providing for the payment of costs in competency cases, appearing in V.A.M.S., 1955, under the subject of guardianship, and reciting the text of pertinent statutes under "General Provisions" which are intended to indicate and do indicate that their scope includes hearings of any and all kinds in guardianship and in incompetency cases, and they are thereby in pari materia with each other on the subject. Said Section 475.085 reads as follows:

"The costs of an inquiry into the competency of any person shall be paid from his estate if he is found incompetent or, if his estate is insufficient, costs shall be paid by the county; but if the person is found not incompetent the costs shall be paid by the person filing the petition, unless he is an officer acting in his official capacity, in which case the costs shall be paid by the county. (L. 1955, p.____, H.B. 30, sec. 299.)"

Honorable Rex A. Henson

Senate Bill No. 59 and House Bill 30 both were passed at the same session of the General Assembly of this state. By the enactment of the two bills on the same subject on the same day, the legislature would be thereby presumed to have enacted the Bills to aid one another and with the intent that since each of them relates to the same subject they should be considered and construed and effected and enforced as one law in incompetency cases of any kind and scope.

In State ex rel Moseley et al. v. Lee et al., 319 Mo. Rep. 976, 5 S.W. (2d) 83, the Supreme Court, 319 Mo. Rep. 1.c. 992, 993, on the question, said:

"It is apparent that the three acts of 1923, aforesaid, each and all deal with the same and identical subject (namely, the board of road overseers) dealt with in said Section 10684, Revised Statutes 1919, and in said Act of April 7, 1921. All said three acts of 1923 were enacted at the same session of the General Assembly, two of said acts having been approved by the Governor on the same day, and the third act having been approved by the Governor nineteen days later.

"Relating, as they do, to the same subject, and therefore being statutes in pari materia, said three acts of 1923 must be construed together as though they constituted one act. (Gasconade County v. Gordon, 241 Mo. 569, 582; State ex inf. v. Amick, 247 Mo. 271, 290; State ex rel. v. Patterson, 207 Mo. 129, 144.) In the Patterson case, supra, this court, en banc, said, quoting approvingly Sutherland on Statutory Construction, section 283; 'All consistent statutes relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. This is true where the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day.' And, in the Gasconade County case, supra, this court, en banc, said, quoting approvingly Black on Interpretation of Laws: 'Especially is it the rule that different legislative enactments passed upon the same

Honorable Rex A. Henson

day or at the same session, and relating to the same subject, are to be read as parts of the same act."

If Senate Bill No. 59 and House Bill 30 relate to the same subjects of hearings in the probate court in insanity cases, generally, and cases of insanity inquiries where a guardianship is involved and requiring notice to the subject of the time and place of the hearing, the appointment by the court of counsel for the subject, if he does not have or is unable to provide counsel, and were passed at the same session of the legislature such acts must be held to be in pari materia. A hearing of such character would avail nothing as to its validity without notice.

Failure to give notice to the alleged insane person of the time and place of a hearing as to his incompetency in any insanity proceeding, whether involving guardianship or in cases where incompetency is the only issue, leaving him without the opportunity to be present and defend the liberty and freedom of his person or to effect his own independent power to act for himself, involving his right to have a judgment on the issue, if against him, reviewed, would be the deprivation as to him of due process of law.

Section 10, of Article I, of our Missouri Constitution - our bill of rights - states: "That no person shall be deprived of life, liberty or property without due process of law."

The Supreme Court of Missouri, in the case of Wilcox et al. v. Phillips et al., 260 Mo. Rep. 664, l.c. 679, on this question, held:

"Due process of law depends on service, i.e., notice, and, absent notice, due process was not given them. As pointed out in *Womach v. St. Joseph*, 201 Mo. l.c. 482: "'Due process of law' means law in the regular course of administration through the courts. (*Jones v. Yore*, 142 Mo. l.c. 44.) The term 'due process of law' is equivalent to the term 'the law of the land' - a term as old as Magna Charta. And, as said by Webster in a brief sparkling forever as a jewel in the crown of the American Bar in the Dartmouth College Case (See 4 Wheat. l.c. 581), 'By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life,

Honorable Rex A. Henson

liberty, property and immunities, under the protection of the general rules which govern society." (Barber Asphalt Co. v. Ridge, 169 Mo. l.c. 384.) "In judicial proceedings," says ANDREWS, J., in Bertholf v. O'Reilly, 74 N.Y. 509, "due process of law requires notice, hearing and judgment."
..."

The Supreme Court of the United States has held in like effect in many cases under the "due process" clause of the Fourteenth Amendment of the federal constitution.

The legislature in sections 1 and 2 of House Bill No. 30, Probate Code of 1955, page 4, has given its own construction of the purpose, terms and effect the bill is intended to have and the procedure to be followed thereunder. Said section reads as follows:

"Effective Date - Application - Saving Clause

"Section 1 of the Probate Code of 1955, enacted by Laws 1955, p. ___, H.B. No. 30, provides as follows:

"1. This Code shall take effect and be in force on and after January 1, 1956. The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of the Code and also all further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court their application in particular proceedings or parts thereof would not be feasible or would work injustice, in which event the former procedure shall apply.

"2. No act done in any proceeding commenced before this Code takes effect and no accrued right shall be impaired by its provisions. When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provision of any statute in force before this Code takes effect, such provision shall remain in force and be deemed a part of this Code with respect to such right, except as otherwise provided herein."

This section of House Bill 30 fixes the effective date of the new Probate Code as January 1, 1956, and provides that the procedure therein prescribed shall govern all proceedings in probate brought

Honorable Rex A. Henson

after the effective date of the Code. The section also further provides that further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court, by application in particular proceedings, they would not be feasible or would work injustice, in which event the procedure prescribed in House Bill 30 shall not apply. The section further provides that no act done in any proceeding commenced before the effective date of the Code, and no previously accrued right, shall be impaired by its provisions.

The legislature then provided that new and pending proceedings at the effective date of the Code shall both be governed by the new Code with the exceptions noted. The legislature then knew of its own enactment of subsection 6 of Senate Bill No. 59, now subsection 6 of section 202.807 Vernon's Annotated Missouri Statutes, 1955, under the subject of "Public Health and Welfare" and that the subjects therein contained related to procedure respecting persons of unsound mind touching public welfare, including hearings, notices, the appointment of counsel for the subject of the inquiry, and the payment of costs incident to the case, and that the two bills in their enforcement in the probate court would likely involve the subject of the inquiry in the matter of the possible deprivation of his personal liberty under guardianship. The legislature was aware, at the time of the enactment of both Senate Bill No. 59 and House Bill 30, that the two bills in many proceedings in the probate court would necessarily have to be construed together in hearings in insanity inquiries and proceedings, and especially in such cases where a guardian must be appointed if the subject should be declared to be of unsound mind. It is true that Senate Bill No. 59 does not provide, expressly, for the payment, or by whom, of the costs of such proceedings. But that Bill does provide for notice to the subject of the inquiry and others to whom notice is required to be given. It requires the attendance of witnesses, and other proceedings prescribed in said subsection 6 of said bill. But House Bill 30 (Section 475.085, Vernon's Annotated Missouri Statutes, 1955, page 142) does provide for the costs to be paid by the county in incompetency inquiries if the subject is found to be incompetent and his estate is insufficient. The terms and effect of Senate Bill No. 59 and House Bill 30, and the fact that they were passed at the same session of the General Assembly, constitute them as being in pari materia. As previously pointed out the Legislature has in Sections 1 and 2 of House Bill 30 given its own construction of the provisions of House Bill 30 in insanity proceedings of any sort, including insanity proceedings instituted under said Section 458.060 in guardianship cases, requiring the appointment of a guardian. The construction given of a statute by the legislature itself, as indicated by language in a section enacted or in other or subsequent enactments, while not controlling, is said by the courts to be entitled to due consideration.

Honorable Rex A. Henson

Our Supreme Court has so held. In the case of State ex inf. Attorney General v. Long-Bell Lumber Co., 321 Mo. Rep. 461, in discussing the question of corporate powers to engage in different lines of business, but all being in some measure germane to the subject covered by them separately and within their corporate powers, the court, l.c. 499, said:

"A further significant factor, though not controlling, but one which is nevertheless entitled to respectful consideration (Hall v. Sedalia, 232 Mo. 344, l.c. 355), is the fact that a subsequent General Assembly so interpret said statutes. ***"

In the case of Hull v. Baumann, 131 S.W. (2d) 721, the Supreme Court of this state, observing the rule of construction of two statutes passed at the same session of the General Assembly, at l.c. 725 said:

"We think the applicable rule is:
"That where two acts are passed at the same session of the Legislature relating to the same subject-matter, as here, they are in pari materia, and, to arrive at the true legislative intent, they must be construed together * * *.""

The same rule of construction was considered and restated in the case of State ex rel v. Mitchell et al., 181 S.W. (2d) 496. The court, on the question, l.c. 499 said:

"Statutes are in 'pari materia' when they are upon the same matter or subject. 31 C.J., p. 358; and the rule of construction in such instances proceeds upon the supposition that the several statutes relating to one subject were governed by one spirit and policy and were intended to be consistent and harmonious in their several parts and provisions. ***"

We believe that under the above authorities, applied to the terms of said bills and the context of the bills themselves, respecting incompetency and guardianship proceedings under Section 297 (New Probate Code, House Bill 30) and under subsection 6 of Senate Bill No. 59, all being in pari materia, costs, of any proceeding to determine the competency of any person in guardianship cases or in any other cases of incompetency shall be paid under Section 475.085

Honorable Rex A. Henson

by the county if the estate of the subject, if the subject is adjudged to be incompetent, is insufficient to pay such costs. This would include reasonable compensation to be allowed by the court for two licensed physicians, the appointment of whom, to examine the proposed patient and report on the mental condition of the patient and his needs, is provided for in subsection 3 of section 3 of Senate Bill No. 59, page 3.

We find no provision in Senate Bill No. 59 or House Bill 30 for the payment of compensation to the special commissioner whose appointment to assist in the conduct of hospitalization proceedings is authorized by section 9, page 5, of Senate Bill No. 59. The section provides that the court is authorized to appoint such commissioner but it is not mandatory that the court do so. If the court does not appoint such special commissioner for such purposes, it would appear that the court would be required to perform the services itself that the commissioner might perform in such proceedings in case he should be appointed by the court, but is not so appointed. In no event does Senate Bill No. 59 or House Bill 30 provide for compensation to be paid to such commissioner. We believe that the rule applies here that a public officer must be able to point to some provision of the statute authorizing payment to him of compensation, and no such authority exists here with respect to the services of such special commissioner.

CONCLUSION

Considering the premises, it is the opinion of this office that Senate Bill No. 59 and House Bill 30, enacted by the 68th General Assembly, prescribing the procedure to be followed in probate proceedings, and other statutes here considered relating to the same subject of insanity hearings, are in pari materia with one another and that in such hearings and proceedings the costs of the proceedings to determine the competency of any person in guardianship cases or other cases of alleged insanity shall be paid under Section 475.085 by the county if the estate of the subject, if he is adjudged to be of unsound mind, is insufficient to pay such costs.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

SEWERS: The dumping of sewage on adjacent property or the
SEPTIC TANKS: maintenance of leaking septic tanks in unincorporated
NUISANCES: areas may constitute a criminal offense and may con-
PROSECUTING stitute a public nuisance which may be abated by
ATTORNEYS: action of the prosecuting attorney.



March 23, 1955

Honorable Ernest J. Hilgert
Assistant Prosecuting Attorney
St. Louis County, Missouri

Dear Sir:

This is in response to your recent request for an opinion of this office wherein you ask:

"I would appreciate you sending me at your earliest opportunity, any Opinions you have relating to the dumping of sewage by individual property owners on to others property or the maintenance of leaking septic tanks in unincorporated areas of counties in Missouri.

"If you have not rendered such an Opinion would you be kind enough to do so."

A search of the statutes of Missouri indicate that, dependent upon the facts in each individual case, the actions to which you refer might be violative of several sections of the Missouri statutes.

Section 559.160, RSMo. 1949, makes it a felony to wilfully poison any spring, well or reservoir of water. It is doubtful, but theoretically possible, that the matters which you mention might constitute violation of this section.

Section 564.010, RSMo. 1949, makes it a misdemeanor for any one to put any dead animal, carcass or part thereof, the offal or any other filth into any well, spring, brook, branch, creek, pond or lake and further makes it a misdemeanor for any person to place in or near any public road or upon any premises not his own or in any of the streams, or water courses any dead animal, carcass or parts thereof or other nuisances to the annoyance of the citizens of this state. It is quite possible that the matters to which you refer in your request might constitute a violation of some of the provisions of this statute.

Hon. Ernest J. Hilgert

Section 564.020, RSMo. 1949 makes it a misdemeanor to wilfully or maliciously defile or in any way corrupt the waters of a well, spring, brook or reservoir used for domestic or municipal purposes. Again it is not likely but possible that the matters to which you refer in your request might constitute a violation of this statute.

Further, it is possible that the facts surrounding the activities mentioned in your request might constitute a public nuisance, that is, they might create a condition which adversely affected the health, welfare or rights enjoyed by the citizens as a whole or as a part of the public. See State ex rel. Wear v. Springfield Gas and Electric Co. (Springfield Court of Appeals) 204 S.W. 942 and Smith vs. City of Sedalia, 152 Mo. 283, 53 S.W.907.

If the sewage were dumped upon a public street or road rather than upon adjoining private property it would seem clear that such practice would constitute a public nuisance. See Sullivan Realty and Improvement Co. vs. Crockett, 158 Mo. App. 573, 138 S.W. 924.

In the events that all of the facts and circumstances surrounding the matters to which you refer would constitute a public nuisance, it is clear that the prosecuting attorney would be empowered to bring an action for the abatement of such public nuisance.

This matter was carefully considered by the Supreme Court en banc in the case of State ex rel. Thrash v. Lamb, 237 Mo. 437, 141 S.W. 665, where the court reached the following conclusion:

"Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance, and that he could proceed without giving bond. * * *"

In this connection see also State ex rel. Lamb v. City of Sedalia (K. C. Court of Appeals,) 241 S.W. 656, and State ex rel. Detienne vs. City of Vandalia, 119 Mo. App. 406, 94 S.W. 1009.

If the action of the persons in question in dumping sewage on adjacent property, or maintaining leaking septic tanks, should constitute a private nuisance but not a public nuisance then, of course, a prosecuting attorney would not be authorized to act in the premises but the injured party could maintain a private action for the abatement of such nuisance and for his damage. Also if the individual property owner suffered special and unique injury different from that suffered by the general public in connection with a public nuisance such individual could maintain his own suit for redress. See Edmondson v. City of Moberly, 98

Hon. Ernest J. Hilgert

Mo. 523.

In the case of a public nuisance the person who caused such nuisance might also be proceeded against by the prosecuting attorney under the provisions of Section 564.080, RSMo. 1949, which makes it a misdemeanor to maintain a public nuisance under certain circumstances.

CONCLUSION

It is the conclusion of this office that if the facts surrounding the matters to which you refer in your request constitute a violation of any of the mentioned statutes or constitute a public nuisance the prosecuting attorney may proceed either to prosecute for violation of such statute or to secure the abatement of the public nuisance.

The foregoing opinion which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

SCHOOLS:
SCHOOL BUILDINGS:
SCHOOL DISTRICTS:

The Board of Directors of a common school district may order the razing of a schoolhouse which has deteriorated so that it is beyond repair and which has no market or salvage value.



March 28, 1955

Mr. Forrest L. Hill
Prosecuting Attorney
Fayette, Missouri

Dear Mr. Hill:

This is in response to your recent request for an official opinion of this office wherein you ask:

"The Directors and a great majority of the electors of a Howard County common school district favor the destruction of the schoolhouse in that district. The Directors feel that they have no authority to order its destruction. The schoolhouse has reached a state of deterioration that is beyond repair; it has no market value, even for salvage. School children of this district have been using the facilities of a neighboring district for the past fifteen years, and the annual meetings are held at various residences in the district. In its present condition, the public feels that the structure is dangerous to the many small children that are frequently playing around and in it. The building is not insured. Who has authority to order the destruction of the building?"

By the provisions of Section 165.207, RSMo. 1949, the government and control of a common school district is vested in its board of directors and by the provisions of Section 166.010, RSMo. 1949, title to schoolhouse sites and all other school property is vested in the school district. The care and keeping of all such property is in the school board under the provisions of Section 166.030, RSMo. 1949, and the statute directs the board to keep the schoolhouses in good repair and the grounds in good condition.

It appears that in the present case the schoolhouse to which

Mr. Forrest L. Hill

you refer has deteriorated so that it is now beyond repair and the school board cannot now carry out the requirements of Section 166.030, supra, by repairing such schoolhouse. It further appears that the schoolhouse has no market value even for salvage and that therefore this problem does not come within the purview of Section 165.203, RSMo. 1949, which vests in the annual meeting of the qualified voters of the school district the power to sell property belonging to the school district.

It further appears from your request that the board, and at least a large number of the public, feels that the schoolhouse is in such a deteriorated condition as to be dangerous to people on or about the premises, especially to small children who frequently play in and around such building.

Under these circumstances it would appear that the school board in carrying out its functions of governing and controlling the school district and of caring for and keeping the property of such district can properly order the destruction of such building in the interest of safety.

CONCLUSION

It is therefore the conclusion of this office that the directors of the common school district to which you refer have authority to order the destruction of the school building which is beyond repair and which has no market or salvage value.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

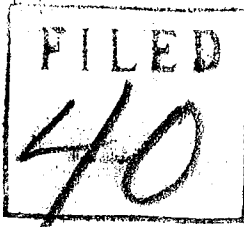
Yours very truly,

FLH:mw

John M. Dalton
Attorney General

PUBLIC RECORDS:
ASSESSOR OF ST. LOUIS CITY:

Assessment lists and assessment books maintained in office of assessor of City of St. Louis are public records open to public inspection.



May 18, 1955

Honorable William E. Hilsman
Member, Missouri State Senate
State Capitol Building
Jefferson City, Missouri

Dear Senator Hilsman:

The following opinion is rendered in reply to your inquiry reading as follows:

"May I have your formal opinion on the question of whether the assessor of the City of St. Louis, Missouri, can refuse members of the public the privilege of inspection of assessment lists and assessment books on file in his office."

Section 82.550, RSMo 1949 provides for the appointment of an assessor for the City of St. Louis, and such officer's qualifications and general duties are outlined in Section 82.560, RSMo 1949, which provides:

"The assessor shall have the qualifications provided with regard to the mayor; receive such salary as may be fixed by the charter or by ordinance; and before entering upon the duties of his office shall take an oath similar to that required by law of county assessors. He shall be the head of the assessment division; appoint the deputy assessors and employees in his division; preserve all maps, plats, books and papers belonging to said division; cause all plats to be prepared, altered and corrected as required by law; receive lists, statements or returns of property; and furnish blanks and information to those desiring to appeal to the board of equalization."

Honorable William E. Hilsman

The foregoing statute discloses that assessment lists are to be a part of the records of the public office of assessor. Section 82.570, RSMo 1949, providing how the costs and expenses of assessments shall be paid, contains this additional proviso:

" * * * provided further, that in all cities in this state not in any county the assessor shall perform the duties now performed by county clerks in extending taxes on the assessment books and such other services pertaining thereto."

Generally speaking, the public has a common law right to inspect all public records. This common law right is expressed by the Supreme Court of Missouri in *State vs. Henderson*, 169 S.W. (2d) 389, 350 Mo. 968, where the Court said, l.c. 392:

"In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; *Clement v. Graham*, 78 Vt. 290, 63 A. 146. Ann. Cas. 1913E, 1208; *Robison v. Fishback*, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann. Cas. 1913B, 1271; *State ex rel. Eggers v. Brown*, 345 Mo. 430, 134 S.W. 2d 28."

However, this common law right of inspection is limited to some extent. The right of the public is not such that they may interfere with the operation of the office where the public records are kept. This limitation is expressed by the Supreme Court of Missouri in *State ex rel. Eggers vs. Brown*, 134 S.W. (2d) 28, l.c. 32, as follows:

" * * * The special commissioner did not hold, and neither do we, that relator's right to inspect and copy the records is an unlimited right. It is subject

Honorable William E. Hilsman

to such reasonable regulations as respondents may impose to prevent undue interference with the work of the employees of the office, and to prevent undue interference with members of the public being served at the office."

We have found no statutory rule applicable to the office of assessor of the City of St. Louis which tends to modify the rules announced in the cases cited above, and consequently such rules are to be applied in this instance.

CONCLUSION

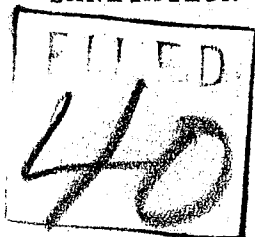
It is the opinion of this office that assessment lists and assessment books in custody of the assessor of the City of St. Louis are public records which are to be available for inspection by members of the public when such inspection will not interfere with the orderly operation of such office.

Yours very truly,

Julian L. O'Malley
Acting Attorney General

JLO'M:vlw

COUNTIES: (1) A county of the third class has no authority
COUNTY COURT: by itself to create a sewer or sanitation district
SEWER DISTRICTS: either as a statutory district or special benefit
SANITATION DISTRICTS: assessment district through its county court.



September 8, 1955

Honorable Andrew J. Higgins
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"The County Court of Platte County has authorized a request for your Opinion for the benefit of the Platte County Planning Commission.

"Platte County is a 3rd class County, lying within the Kansas City metropolitan area, immediately northwest of the Kansas City, Missouri-Kansas City, Kansas city limits. Said County during the past 2 years has undergone substantial changes in the use of its land by subdivision of properties. The number of homes built in the County has steadily increased and the prospect for the future is that this development will continue at an ever-increasing rate. However, subdividers have now been advised that sewage disposal plants of the community type, maintained and operated by home-owners groups and associations will no longer be acceptable in applications for guaranteed home loans; with the suggestion that the operation of future sewage treatment plants be taken over by the political subdivision involved, i.e., the city, town, village, or County, in which the plant is located. The last named political subdivision is the one here involved since the greater subdivision developments are in unincorporated areas of the County. This situation is rapidly bringing large residential developments to a stand-still. Developers and

Honorable Andrew J. Higgins

the Planning Commission are in sympathy with such rulings since the community type treatment is not a final answer to sewage disposal, however, an alternative answer does not readily present itself.

"Based on engineering advice, a lagoon type of disposal plant located in the lower end of a given water shed connected with up-stream developments by permanent sanitary sewers serving the entire drainage district would seem most feasible. The major difficulty confronting such a plan and proposal is the acquisition of right-of-way for the sewers and lagoon; and the establishment of some sort of taxing and assessing structure by which the system could be perpetually operated and maintained. Subdividers themselves, since they are presently required to build their own community type treatment plant, would no doubt be willing to pay the sum of money necessary for that purpose over to the use of the 'sewer authority' for purpose of setting up the original fund necessary to pay for the right-of-way and construction.

"The following questions arise:

"1. Is there any authority for a County of the 3rd class through its County Court to create a sewer or sanitation district either as a statutory district or special benefit assessment district, either of which would have some sort of tax and assessment structure for its perpetuation?

"2. Whether or not the authority for a district such as contemplated in Number 1 above exists, does the County through its County Court have the necessary authority to condemn for a sewer right-of-way and lagoon?

Honorable Andrew J. Higgins

"3. If an affirmative answer can be found to Number 1 and 2 above, can the County by its County Court enter into the necessary contracts covering receipt and application, from the original subdividers, of such funds necessary to construct the lagoon and connecting sewers?"

In answering your first question it must be remembered that the county and the county court have only such authority as is given to them by the legislature. *Bradford vs. Phelps Co.*, Mo. Sup., 210 S.W.2d 996; *Clark vs. Adair Co.*, 79 Mo. 536; *McClellan vs. City of St. Louis*, 170 S. W. 2d 131.

There is no provision in the Constitution of Missouri, 1945, authorizing a county of the third class by itself, or in conjunction with any other political subdivision, to create a sewer or sanitation district. The statutory provisions for the creation of sewer and sanitation districts are found in Chapters 248 and 249, RSMo 1949, and Cumulative Supplement, 1953. Chapter 249 has to do with the creation of sewer districts in St. Louis and Jackson counties, and counties having a population of not less than one hundred thousand inhabitants. Chapter 248 authorizes the creation of sanitation districts in those areas of the state which lie in part within and part without the corporate limits of any city having a population of three hundred thousand inhabitants or more, and which lies in part within a county or counties of the state whether such county or counties be of any class whatsoever. Thus, if part of a proposed sanitation district is in a city of three hundred thousand inhabitants or more, then any county of the third class within which part of such proposed sanitation district area lies, is authorized to take steps toward the creation of such district. However, your request contemplates Platte County by itself, through its county court, establishing a sewer or sanitation district not in conjunction with any city having a population of three hundred thousand or more. Thus, under the circumstances presented in your request no part of the area proposed for a sanitation district lies in such a city having three hundred thousand population or more, and thus as stated under the circumstances in your request Platte County being a third class county, is not authorized by itself to create a sanitation district under any of the provisions of Chapters 248, 249 RSMo 1949, Cumulative Supplement, 1953.

Honorable Andrew J. Higgins

Thus, the answer to your first question must be in the negative since neither the county nor the county court of a third class county has authority by itself to create a sewer or sanitation district.

In view of the fact that the answer to your first question is in the negative it is the belief of this office that any answer to the second and third question is unnecessary.

CONCLUSION

It is the opinion of this office that there is no constitutional or legislative authority for a county of the third class by its county court by itself to create a sewer or sanitation district in any way.

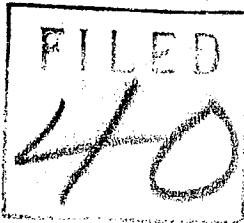
The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

Yours very truly

John M. Dalton
Attorney General

HLV:GMcK:lc

COUNTIES:
SEWAGE DISTRICT:
PLANNING
COMMISSION:



1. County Planning Commission does not have the authority to include in the official master plan of a county a sewage disposal plan when the county lacks the authority to establish the system.
2. There is presently no authority for Platte County to condemn for right-of-way for a sewage disposal system.

December 6, 1955

Honorable Andrew J. Higgins
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

Your October 19 request for an opinion reads as follows:

"Receipt of your opinion prepared by Harold L. Volkmer, bearing the date September 8, 1955, regarding sewer districts in Counties of the third class is hereby acknowledged.

"In the request that follows, I refer also to the conference in Kansas City, Missouri October 13, 1955, where this problem was discussed in considerable detail.

"Pursuant to the conference and the original opinion, the County Court of Platte County, Missouri suggests a request for additional information based on the following facts.

"Platte County is a 3rd class County, lying within the Kansas City metropolitan area, immediately northwest of the Kansas City, Missouri-Kansas City, Kansas city limits. Said County during the past 2 years has undergone substantial changes in the use of its land by subdivision of properties. The number of homes built in the County has steadily increased and the prospect for the future is that this development will continue at an everincreasing rate. However, subdividers have now been advised that sewage disposal plants of the community type, maintained and operated

Honorable Andrew J. Higgins

by home-owners groups and associations will no longer be acceptable in applications for guaranteed home loans; with the suggestion that the operation of future sewage treatment plants be taken over by the political subdivision involved, i. e., the city, town, village, or County, in which the plant is located. The last named political subdivision is the one here involved since the greater subdivision developments are in unincorporated areas of the County. This situation is rapidly bringing large residential developments to a stand-still. Developers and the Planning Commission are in sympathy with such rulings since the community type treatment is not a final answer to sewage disposal, however, an alternative answer does not readily present itself.

"Based on engineering advice, a lagoon type of disposal plant located in the lower end of a given water shed connected with up-stream developments by permanent sanitary sewers serving the entire drainage district would seem most feasible. The major difficulty confronting such a plan and proposal is the acquisition of right-of-way for the sewers and lagoon; and the establishment of some sort of taxing and assessing structure by which the system could be perpetually operated and maintained. Subdividers themselves, since they are presently required to build their own community type treatment plant, would no doubt be willing to pay the sum of money necessary for that purpose over to the use of the 'sewer authority' for purpose of setting up the original fund necessary to pay for the right-of-way and construction.

"The Platte County Planning Commission has at this time prepared its recommended sewer and sanitary system plan which would

Honorable Andrew J. Higgins

drain the major water shed draining the present subdivision contemplated. For your assistance, a map is enclosed herein which shows the geographical location of the proposed system in relation to the ultimate outlet i.e., the Missouri river and the subdivision developing at the head of the water shed.

"The recommendation has been in effect approved by the County Court, and accepted by the Court subject to a determination as to how the plan could be put into effect. It is felt that the right of condemnation conferred on County Courts in Chapter 49, R.S.Mo. 1949, is broad enough to include condemnation for this purpose. It is further felt, that the County Court may have the necessary authority to enter into a comprehensive contract with the present subdividers whereby the money that they would at this time expend on their own individual facilities would be placed in a fund to be used for construction of the original trunk lines and disposal plant. As other subdividers enter the area, they would be requested before being granted authority to build, to place a sum in the fund which would cover the cost of constructing the necessary branch lines to drain their subdivision. Those sums would, in the contemplated plan, would be required to be something in addition to the actual cost of construction so that a sum would be available for eventual extension of the system and held against gross maintenance and repair costs.

"In order to determine the propriety of this plan from the stand point of the County Court, the following questions need an answer.

"1. Under the provisions section 64.510 to 690 inclusive, R. S. Mo., 1949 is the recommendation of an overall sewage disposal plan

Honorable Andrew J. Higgins

for a portion of the County a proper function of this Planning Commission and may same be accepted by the County Court when it encompasses only a part of the unincorporated area of the County?

"2. Irrespective to the answers to question 1, is the authority in Chapter 49, R.S.Mo., broad enough in its scope to authorize the County to condemn the right-of-way for this or any other type of sewage disposal system for the benefit of subdivision areas alone?

"3. Assuming that the right-of-way can be obtained either by virtue of the authority in question 2 or otherwise, may the County Court contract with the subdividers concerned to use their money to build the initial installation?

"4. In view of the possible future expansion beyond the two present subdivisions, can any prospective subdivision be compelled to make a contribution and enter into such a contract as above described, as a condition of his being issued building permits on the land he seeks to subdivide and in view of his probable willingness to provide for his own individual system to handle his own subdivision?

"5. In the event that such contracts are properly within the scope of the County Court, may the money involved be administered by way of an escrow account rather than the County Court directly handling same?"

It appears that question 2 is the main one in your request, and that the answer to question 1 is not particularly pertinent

Honorable Andrew J. Higgins

because, notwithstanding the authority or "proper function" of the planning commission, the ultimate answer to your problem depends upon the authority of the county court.

It seems from a study of the statutes that the commission does have the authority sought.

Section 64.550, RSMo Cum. Supp. 1951, gives the commission power to make, publish and adopt an official master plan. They may make all of it at one time, or part of it at a time; they may amend it. The statute does not give the commission the authority to make a separate master plan for parks, wildlife refuges, highways, public buildings, sewers etc.

It is noted in the Myers' plan submitted in the preliminary report of the planning commission, which you enclosed, that the statement is made: "Sanitary drainage districts would be created and incorporated into a Master Plan for Sewers * * *" Such a plan might well be included in the official master plan and it might well be that the proposed sewer plan here involved could be included in the official master plan despite the fact that it is not for the entire county. The commission also could provide for this sewer in its set of regulations which would not have to be a part of the official master plan.

Section 64.580 states that the commission may adopt "as parts of the official master plan or otherwise, sets of regulations" which may include "the extent to which * * * sewer * * * services shall be provided" for "subdivisions of land in unincorporated areas."

However, as a practical proposition, it would seem meaningless for the planning commission to have the authority to make plans for the county that the county cannot carry into effect. We are convinced, therefore, that the answer to whether or not the commission has the authority in question depends upon whether or not the county can effectuate those plans. This brings us to a consideration of your question number 2.

It is believed that the opinion submitted to you September eighth of this year answers this question. In the opinion of this office, if the county lacks the authority to create a sewer district or system of any sort it definitely lacks the authority to condemn the right-of-way for any type of sewage disposal system.

Honorable Andrew J. Higgins

This is so whether the sewage disposal system is for the benefit of subdivision areas only, or whether the system is for the entire county.

It is believed that Section 49.300, which states that the county court may institute condemnation proceedings when they seek to appropriate property "for any other public purpose whatsoever," is not sufficient for the present purpose. It is believed that the words "for any other public purpose" as used herein, merely mean any other public purpose that is constitutionally and legislatively authorized.

In this respect we desire to direct your attention to the statements in the September eighth opinion that Chapter 248, RSMo 1949, might well be used as authority for your county at any time that a part of the sewer district will lie within the city limits of a city having a population of 300,000 inhabitants or more.

In view of the answer to question number 2, it is deemed unnecessary to discuss your questions 3, 4 and 5. They assume an affirmative answer to question number 2.

CONCLUSION

It is the opinion of this office that a county planning commission does not have the authority, under Chapter 64, RSMo 1949, to make recommendations for a sewage disposal system or district unless the county has the authority to create such. It is further the opinion of this office that Platte County presently has no authority to condemn for the right-of-way for a sewage district or a sewage disposal system.

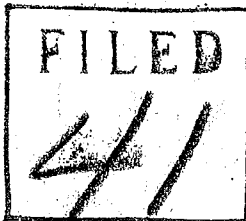
The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

STATE AUDITOR:
CITIES, TOWNS
AND VILLAGES:

Cities, towns and villages are political subdivisions of the state within meaning of the statute providing for audit by State Auditor of political subdivisions.



March 7, 1955

Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"Will you furnish this department with an official opinion based on the following question:

Is a city, town or village a political subdivision in the meaning of Section 29.230, RSMo 1949, so that we would be empowered to make an audit upon request of 5% of the qualified voters of such city?"

Section 29.230, RSMo 1949, provides as follows:

"At least once during the term for which any county officer is chosen, the state auditor shall examine, inspect, and audit the accounts of the various county officers of the state supported in whole or in part by public moneys, and without cost to the county, county clerks, circuit clerks, recorders, county treasurers, county collectors, sheriffs, public administrators, probate judges, county surveyors, county highway engineers, county assessors, prosecuting attorneys, county superintendents of schools, in every county in the state which does not elect and have a county auditor. Such audit shall be made by the state auditor as near the expiration of the term of office as the auditing force of the state auditor will permit. Such audit shall be made in counties having a county auditor whenever qualified voters of the county to a number equal to five per cent of the total number of votes cast in

Honorable Haskell Holman

said county for the office of governor at the last election held for governor preceding the filing of such petition shall petition the state auditor for such audit, but such counties shall pay the actual cost thereof into the state treasury; provided, that any county having an audit by petition shall not be audited more than once in any one year. He shall audit any department, board, bureau or commission of the state which is under the control or supervision of the governor or any other elected official of the state, upon the request of the governor, and he shall further audit any political subdivision of the state whenever requested to do so by five per cent of the qualified voters of such political subdivision, determined on the basis of the votes cast for the office of governor in the last election held. Such political subdivision shall pay the actual cost thereof; provided, that no political subdivision shall be so audited by petitions more than once in any one calendar or fiscal year."

The phrase "political subdivision of the state" is employed frequently in constitutional and statutory provisions. It has not received uniform application in all of its uses. Section 3 of Article V of the Constitution of Missouri, 1945, gives the Supreme Court appellate jurisdiction in cases where the "state or any county or other political subdivision of the state" is a party. A city within a county has been held uniformly not to be a "political subdivision of the state" within the meaning of this provision. In the case of *Kansas City v. Neal*, 122 Mo. 232, 1.c. 234, the court, in discussing the similar provision of the 1875 Constitution (Sec. 12, Art. VI), stated:

"That Kansas City is not a political subdivision of the state, within the meaning of the constitution is equally clear. Subdivision means to divide into smaller parts the same thing or subject matter, and no city or town in this state is a subdivision thereof except the city of St. Louis, and it became so under sections 20, 22 and 23, article 9, state constitution, and by an act of the legislature in pursuance thereof setting off certain defined boundaries defining the city limits, and conferring upon the city all the rights and privileges possessed by a county. Voters in all other cities and towns, act in common with the voters of the county or counties in which they may be located in electing

Honorable Haskell Holman

county and state officials and do not simply, because of their incorporation, become subdivisions of the state. Kansas City is within Jackson county and is not a subdivision thereof or of the state."

Section 13 of Article XIV of the 1875 Constitution, as amended, prohibited nepotism by "any public officer or employee of this state or any political subdivision thereof." In the case of *State ex inf. Ellis ex rel. Patterson v. Ferguson*, 333 Mo. 1177, 65 S.W. (2d) 97, the court held a city of the third class to be a "political subdivision" within the meaning of such provision. In that case the court stated, 65 S.W. (2d) 1.c. 99:

"Is a city of the third class a political subdivision? A standard work on municipal corporations so defines it in the following language: 'A municipal corporation, in its strict and proper sense is a body politic and corporate constituted by the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law as an agency of the State to assist in civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district which is incorporated.' Dillon (5th Ed.) vol. 1, Sec.31. (Italics ours.)

"Section 47 of article 4 of the original Constitution, prohibiting the lending of credit, refers to counties, cities, towns, or townships as 'political corporations or subdivisions of the State.' (Italics ours.)

"We approve the following observations made in *Kinney v. City of Astoria*, 108 Or. 514, 528, 217 P. 840, 845: 'Pure municipal corporations, such as cities, are merely instrumentalities of the state, established for the convenient administration of local government; they are state governmental agencies; they are auxiliaries of the state for the purpose of self-government; they are mere political subdivisions of the state created by authority of the state for the purpose of exercising a part of its powers.'"

A school district has been held not to be a political subdivision of the state within the constitutional provision conferring appellate jurisdiction on the Supreme Court. *State ex rel. School District No. 4 v. School District No. 3*, 238 Mo. 407, 141 S.W.1111.

Honorable Haskell Holman

However, a school district was held to be a political subdivision within the meaning of the nepotism provision of the 1875 Constitution, above referred to, in the case of *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, 63 S.W.(2d) 100, 1.c. 102, 88 A.L.R. 1099. The court stated:

"Respondent next contends that a school district is not a political subdivision of the state. The authorities are to the contrary. It is defined by a standard text as follows: 'A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools.' 56 C. J. 193.

"This definition is approved by this court in *State ex rel. Carrollton School Dist. v. Gordon*, 231 Mo. 547, loc. cit. 574, 133 S.W. 44, 51, in which we said: 'A school district is but the arm and instrumentality of the state for one single and noble purpose, viz., to educate the children of the district; a purpose dignified by solemn recognition in our Constitution (section 1, art. 11 * * *), reading: "A general diffusion of knowledge and intelligence being essential to preservation of the rights and liberty of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years". In obedience to that constitutional mandate, the General Assembly has established such schools and given over to school districts, acting through boards of directors, the single duty and authority to maintain them.'

"In *City of Edina to use v. School District*, 305 Mo. 452, loc. cit. 461, 267 S.W. 112, 115, 36 A.L.R. 1532, we also said: 'Under the Constitution of 1875, the public schools have been intrenched as a part of the state government and it is thoroughly established that they are an arm of that government and perform a public or governmental function and not a special corporate or administrative duty. They are purely

Honorable Haskell Holman

public corporations, as has always been held of counties in this state.'

"Respondent directs attention to decisions of this court holding that, under section 12, art. 6, of the Constitution, a school district is not a political subdivision of the state. In doing so we said:

"The defendant is a drainage district. Is such district such a political subdivision of the state as to give us jurisdiction under the provisions of section 12, art. 6, of the Constitution? We think not. It is true that we have said that it was a political subdivision, of the state. Morrison v. Morey, 146 Mo. 543, 48 S.W. 629. But so is a township or a school district. Whilst they are political subdivisions of the state, they are not such as are contemplated by the section of the Constitution, supra, referring to our jurisdiction.* * *

"We are of the opinion that the words "other political subdivisions of the state," as used in section 12, art. 6, following as they do, the word "county," mean such political subdivisions as may be created having power similar to those of a county, and do not refer to townships, school districts, levee districts, drainage districts, and such like minor political subdivisions of the state.' Wilson v. Drainage & Levee District, 237 Mo. 39, loc. cit. 46,48, 139 S.W. 136, 139.

"Thus it appears that a school district is a political subdivision of the state within the meaning of section 13, art. 14, of the Constitution."

From the foregoing discussion, it appears that the Supreme Court has given the phrase "other political subdivisions of the state," as employed in the constitutional provision relative to its appellate jurisdiction, a somewhat restricted meaning because of its use following the word "county." Under this provision the "political subdivision" must exercise powers similar to those exercised by counties. Only townships in counties under township form of government (Harrison and Mercer County Drainage District v. Trail Creek Tp., 317 Mo. 933, 297 S.W.1) and the city of St. Louis (Kansas City v. Neal, supra) have been held to come within the provision.

Honorable Haskell Holman

Inasmuch as the limited application of the term as used in the Constitution relative to the appellate jurisdiction of the Supreme Court has been made by the Supreme Court by reason of the use of the term in connection with the word "county," we are of the opinion that the Legislature, in Section 29.230, supra, in speaking of "political subdivisions of the state" generally, did not intend any such narrow and limited meaning, but intended the broader and more generally understood meaning applied in the cases cited above in which the courts held that cities and school districts were "political subdivisions" and that a city, town or village is a political subdivision within the meaning of section 29.230 RSMo 1949.

CONCLUSION

Therefore, it is the opinion of this office that a city, town or village is a political subdivision within the meaning of Section 29.230, RSMo 1949, providing for audits by the State Auditor of "any political subdivision of the state whenever requested to do so by five per cent of the qualified voters of such political subdivision,* * *."

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW/ml/ld

SHERIFFS: Sheriff of one county may employ sheriff of another county to act as guard in transporting prisoners to penitentiary, such guard to be paid as provided in Section 57.290, RSMo 1953.Cum. Supp.

May 4, 1955



Honorable Haskell Holman
State Auditor
State Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads, in part:

"We have an appropriation for 'Costs in Criminal Cases - Transportation.' This appropriation is made for the purpose of paying sheriffs or other officers for transporting prisoners to the penitentiary after conviction and is made particularly under the provision of Paragraph 3, Section 57.290 RSMo 1949, and as amended Laws of Missouri 1953.

"The point which we wish clarified is that relating to authority for employment and payment for guard or guards. Is it permissible for the sheriff of one county to use the sheriff of another county to act as a guard in transporting a prisoner to the penitentiary after conviction, and is the state authorized to pay the per diem and mileage fee for a guard thus used?"

Paragraph 3 of Section 57.290, RSMo Cum. Supp. 1953, to which you refer, provides, in part, as follows:

"3. For the services of taking convicts to the penitentiary, the sheriff, county marshal or other officers shall receive the sum of three dollars per day for the time actually and necessarily employed

Honorable Haskell Holman

in traveling to and from the penitentiary, and each guard shall receive the sum of two dollars per day for the same, and the sheriff, county marshal or other officer and guard shall receive seven cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of departure to the penitentiary; * * *. When three or more convicts are being taken to the penitentiary at one time, a guard may be employed, but no guard shall be employed for a less number of convicts except upon the order, entered of record, of the judge of the court in which the conviction was had, and any additional guards employed by order of the judge shall, in no event, exceed one for every three prisoners; * * *"

Under date of December 20, 1949, this office issued an opinion to J.L. Sturgis, assistant prosecuting attorney, Greene County, holding that under a substantially similar statute the sheriff may, of his own accord, employ a guard whenever he is required to transport three or more persons to the state penitentiary at one time, and if a lesser number of persons are being so transported, the sheriff may then employ such guards only upon order entered of record by the judge of the court in which conviction was had. A copy of this opinion is enclosed herewith. Also under date of February 23, 1950, this office issued an official opinion to Gordon J. Massey, prosecuting attorney, Christian County, which opinion held that the sheriff was not required to take a paid deputy sheriff and that a guard not a deputy sheriff is entitled to retain the compensation provided therefor. A copy of this opinion is likewise enclosed herewith.

You further inquire whether it is permissible for the sheriff of one county to employ a person who is the sheriff of another county as a guard in transporting prisoners to the penitentiary. We are unable to find any applicable provisions of law which would prohibit a sheriff of one county from employing a person who is the sheriff of another county as a guard, or any provision which would prohibit the sheriff of another county from accepting such employment. Consequently, we are of the

Honorable Haskell Holman

opinion that such may be done, and that the state is authorized to pay such guard \$2.00 per day and seven cents per mile, as provided by Section 57.290, supra. Such person so employed would not be acting in his official capacity as sheriff, but merely as a guard.

CONCLUSION

Therefore, it is the opinion of this office that the sheriff of one county may employ a person who is the sheriff of another county to act as a guard in transporting prisoners to the penitentiary.

We are further of the opinion that the state is authorized to pay such person so employed \$2.00 per day and seven cents per mile, all as provided by Section 57.290, RSMo 1953 Cum. Supp.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG/vtl

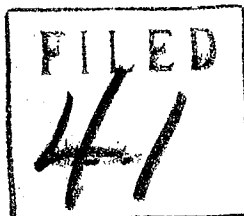
Enclosures - 2

12-20-49 to J.L. Sturgis

2-23-50 to Gordon J. Massey

MAYORS:
CITIES OF THE 4TH CLASS:
PUBLIC OFFICIALS:
OFFICIALS OF CITIES:
CONTRACTING WITH THE
CITY:

The Board of Aldermen of a 4th class city is not authorized to pay its mayor a fee of \$30.00 for auditing the books of said city and such action violates the provisions of Section 106.300, RSMo. 1949.
May 9, 1955



Honorable Haskell Holman
Auditor of Missouri
Jefferson City, Missouri

Dear Mr. Holman:

You recently requested an official opinion of this office wherein you asked:

"Will you please furnish this department with an official opinion based upon the following questions:

"1. Is the board of aldermen of a fourth class city authorized to pay the mayor of such city a fee of \$30.00 for services performed in auditing the books of said city?

"2. Does the payment of the \$30.00 to the mayor constitute contractual relations between the mayor and the city and, if so, has the provisions of Section 106.300, RSMo 1949, been violated."

The general law on this subject clearly appears to be that public officials and members of governing bodies of the state or its subdivisions or municipalities cannot have any interest in a contract with the city or governing body of which they are a member. For a general statement of this proposition see 43 Am. Jur. Public Officers, Section 341, page 135. The law of Missouri follows this general rule as is seen from the cases cited herein infra. Further, Section 106.300, RSMo 1949, provides:

"If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor; and any appointed officer becoming so interested shall be dismissed from office immediately by the mayor; and upon the mayor becoming satisfied that any elective officer is so interested, he shall immediately

Hon. Haskell Holman

suspend such officer and report the facts to the council, whereupon the council, as soon as practicable, shall be convened to hear and determine the same; and if, by two-thirds vote of the council; he be found so interested, he shall be immediately dismissed from such office."

thus, specifically prohibiting any city official (which clearly includes the mayor of a 4th class city) from being interested in any contract under the city.

As seen from the case of State ex rel. Streif vs. White (App.) 282 S.W. 147, this statute specifically applies to the mayor of the city and even though the interest in a contract may be indirect, it prohibits such contract.

In the present case the mayor has the power under the provisions of Section 79.350, RSMo 1949, to require any officer of the city to exhibit his accounts and to report to the board of aldermen thereon. Thus, the action of the mayor in auditing the books of the city would come under his official powers as mayor and certainly the mayor cannot receive compensation for services rendered under his official power as mayor in excess of the salary approved for such office. Because of these statutes this case does not come within the doctrine expressed by the Supreme Court in Pelk Tp, Sullivan County v. Spencer, (Sup.) 259 S.W. 2d. 804, where the court held the contract was voidable but not void. In that case a member of the township board had performed actual manual labor upon township roads and had been paid compensation at an hourly rate therefor. The court pointed out that such labor did not come within the purview of the duties of a member of the township board and that while public policy prevented the township official from contracting with the township for labor, that when such contract was performed on both sides it would not be disturbed; the contracts being voidable not void.

The court also pointed out that there was no specific statute applicable to townships comparable to Section 106.300, applicable to cities.

CONCLUSION

Thus, it would appear that both on the basis of public policy as embodied in the general common law, and on the basis of the specific statute (Section 106.300), that the city was not authorized

Hon. Haskell Holman

to pay the mayor for auditing the books of the city and that such payment would violate Section 106.300.

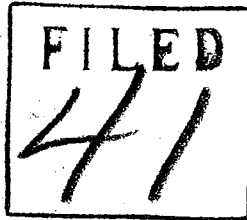
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:mw

PROBATE COURT: Securities on an administrator's bond are
ADMINISTRATORS: required to be residents of the county in
BONDS: which the court granting letters of admin-
istration is situate.



May 18, 1955

Honorable Robert Hoelscher
Prosecuting Attorney
Warren County
Warrenton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"Section 461.260 RSMo, 1949, provided in the past that; 'The Court, or judge or clerk in vacation, shall take a bond of the persons to whom letters of administration are granted, with two or more sufficient securities resident in the County'.

"May we have your opinion as to the proper interpretation of the phrase 'resident in the County'? Does this require the securities to be residents of the County in which the Court is located, or may they be residents of the County of which the administrator is a resident?"

Section 461.260, RSMo 1949, to which you refer, provides as follows:

"The court, or judge or clerk in vacation, shall take a bond of the persons to whom letters of administration are granted, with two or more sufficient securities, resident in the county, to the state of Missouri, in such amount as the court or judge or clerk shall deem sufficient, not less than double the amount of the personal estate."

Honorable Robert Hoelscher:

You inquire whether the term "resident in the county," as contained in the above section and relating to securities on a bond required to be given by persons to whom letters of administration are granted, means that the securities are to be residents of the county in which letters are granted, or whether such securities are required to be residents of the county of which the administrator is a resident.

Who may or may not be sureties is a matter of statutory regulation (23 C.J., Executors and Administrators, Sec. 201, p. 1074). Section 461.260 was first enacted in substantially the same form in the year 1807, 1 Ter. Laws, p. 126, Sec. 3. Taking into consideration the time when this requirement was imposed, the circumstances then existing, particularly in regard to travel and communication, the context of Section 461.260 and related statutory provisions, we are of the opinion that the securities referred to must be residents of the county in which letters are granted. In the case of *Barksdale v. Cobb*, 16 Ga. 13, decided in 1854, a suit was brought to compel the court to accept securities who were residents of an adjoining county. There was no statutory requirement that securities be residents of the county. While mandamus was refused for other reasons, the Supreme Court of Georgia said:

"We would not be understood as holding, that in every instance, and under all circumstances, the Ordinary should be compelled to accept securities residing out of the county, provided they were solvent. Their residence might be so remote as to justify him in withholding letters. For we are not unmindful of the necessity and importance of enabling that officer, as well as the heirs, of maintaining a proper supervision and control over the circumstances and condition of the parties."

Honorable Robert Hoelscher:

We further wish to call your attention to Section 461.360, relating to the duties of the probate court. Said section provides, in part, as follows:

"* * * and it shall be the duty of the judge annually to examine all bonds of executors and administrators, guardians and curators, on file in his said office, and if, upon examination thereof, he shall have good reason to believe that any security has become a nonresident of the state or county, or has died or become insolvent, the judge thereupon shall make an order that said executor or administrator give another bond to the satisfaction of said judge or court, and upon failure to give such bond within ten days after such order shall be made, the judge may make an order revoking his or her letters and their authority from that time shall cease. (R.S. 1939, Sec. 22, A. 1949 S.B. 1132)."

Both this section and Section 461.260 relate and refer specifically to the duty and authority of the probate court or judge or clerk thereof, rather than to the duties and obligations of the administrator, and therefore we must conclude that the term "resident in the county," as used, imposes the requirement that securities be residents of the county wherein letters are issued.

CONCLUSION

Therefore, it is the opinion of this office that securities on an administrator's bond are required to be residents of the county in which the court granting letters of administration is situate.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

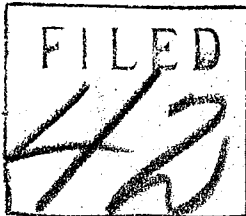
Yours very truly,

DDG:vtl:irk

JOHN M. DALTON
Attorney General

SALARY:
OFFICES:
CORONER:
SHERIFF:

A coroner performing the duties of sheriff due to a vacancy in the office may not receive additional salary.



October 6, 1955

Honorable John Hosmer
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

This is in response to your request for an official opinion which reads as follows:

"On July 31, 1955, the sheriff of Webster County, the Honorable E. I. Cunningham, died. Immediately thereafter, the coroner of Webster County, the Honorable K. K. Kelley, qualified as sheriff under the statutes made and provided. Our county court asked the opinion of our circuit judge and we have been unable to find any specific statutory enactment allowing the coroner acting as sheriff to be paid any salary therefor. The coroner acted for about eight days at which time, in view of his understanding of the absence of a statutory provision authorizing him to draw a salary, he asked the court to be relieved, and the Court under its power acted by appointing another as acting sheriff. Is there a statutory enactment for the coroner when acting as sheriff, due to the death of the incumbent, receiving a salary therefor?"

At the outset, two statutory provisions should be noted:
Section 58.200, RSMo 1949:

Honorable John Hosmer

"When the office of sheriff shall be vacant, by death or otherwise, the coroner of the county is authorized to perform all the duties which are by law required to be performed by the sheriff, until another sheriff for such county shall be appointed and qualified, and such coroner shall have notice thereof, and in such case, said coroner may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

Section 57.080; RSMo 1949:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified;
* * *

It is clear, thus, that in the interim between the death of the incumbent sheriff and the appointment by the county court of a successor, the coroner will perform the sheriff's duties.

No statute, however, provides for additional salary to a coroner acting as sheriff. Without statutory authorization, such compensation cannot be paid. As the Missouri Supreme Court stated in *State ex rel. Evans v. Gordon*, 245 Mo. 12, at page 28:

"* * * In *Bank v. Refrigerating Co.*, 236 Mo. 414, Brown, J., speaking for the court says: 'When the law requires a specific service to be performed by a public officer, he must

Honorable John Hosmer

perform that service regardless of whether any provision has been made to pay him for same.'

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same.* * *'"

CONCLUSION

It is, therefore, the opinion of this office that a coroner performing the duties of sheriff due to a vacancy in the office may not receive additional salary.

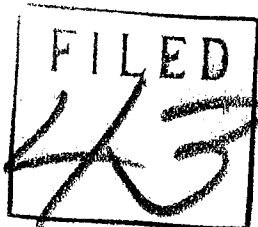
The foregoing opinion, which I hereby approve, was prepared by my assistant, Walker La Brunerie, Jr.

Yours very truly,

John M. Dalton
Attorney General

WLaB:vlw

ELECTIONS: County committeeman holds over until his
POLITICAL PARTIES: successor is elected and qualified.
COMMITTEEMAN:



January 3, 1955

Honorable Harold S. Hutchison
Prosecuting Attorney
Maries County
Vienna, Missouri

Dear Mr. Hutchison:

In your recent request for an opinion of this office,
you ask:

"A man in this county had his name put
on the ticket of the Republican Party
for Committeeman, 1948, then was elected
and qualified. In 1950, 52 and 54 his
name did not appear upon the ballot and
was not written in.

"My question is, did he continue to hold
office until his successor was elected and
qualified and is he at present a township
committeeman?"

It is assumed that no one else received any votes what-
soever for the office which the committeeman to whom you refer
held, and that, therefore, there was no successor elected as
Republican Committeeman in either the years of 1950, 1952,
or 1954.

Section 12 of Article VII, Constitution of 1945, provides:

"Except as provided in this constitution,
and subject to the right of resignation,
all officers shall hold office for the
term thereof, and until their successors
are duly elected or appointed and qualified."

Hon. Harold Hutchison

Likewise, Section 105.010 RSMo 1949 provides:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

Under similar provisions of the Constitution and laws in effect in 1922, the Supreme Court of Missouri, in the case of State ex rel. Ponath v. Hamilton, 240 S.W. 445, reached the conclusion that at least for purposes of tenure and similar matters party committeemen were officers under the above quoted provisions. The court concluded, l.c. 448:

"We conclude, therefore, not from inference or implication, but from an interpretation based upon the nature and purpose of the statute creating party committeemen and the uniform character of the duties devolving on them as such, regardless of whether they are elected in the city of St. Louis by wards or in a county by townships, that they are, so far as affects their official tenure and the right to maintain and establish same, county officers; and hence within the purview of the section (4896 R.S. 1919) regulating contested elections."

Thus it appears that for the purposes of this question, the party committeeman would hold over where no successor has been elected and qualified, and would be, at present, the holder of the office of Republican Committeeman.

Further, it appears that the general rule is that unless the statutes make a contrary requirement, those elected to an office such as committeeman will hold over and fill the office until their successors are elected and qualified or accept the office. This general rule is expressed in 29 C.J.S., Elections, Section 86, page 117, where it is stated:

"In accordance with the general trend of decisions in this country as regards officers generally, see the C.J.S. title Officers Sec. 48, also 46 C.J. p 968 note 55, in the absence of any general law or rule or usage of the party to the contrary, party officers, such as committeemen, are

Honorable Harold S. Hutchison

entitled to hold their positions until their successors are appointed or chosen and have qualified or until such successors are elected pursuant to statute regulating elections."

Section 120.770 provides for the election of committeemen in the August primary. However, this statute does not make any provision for the length of the term of office and is silent as to whether or not the committeeman will hold over after his normal term of office expires. Section 120.800 provides that the county committee shall be composed of the committeemen and committeewomen elected at the August primary next preceeding. However, this section is also silent as to any possible holding over.

A further search of the statutes reveals that by the provisions of Section 120.780, committeemen and committeewomen for counties of the first class hold office for two years and "until their successors are duly qualified and elected." Likewise, by Section 120.790, it is provided that committeemen and committeewomen for the City of St. Louis hold office for a period of four years and "until their successors are duly elected and qualified." Thus, although it appears that the statutes do not specifically provide that committeemen in your county shall hold over, the Legislature has provided for such holding over in other counties and in the City of St. Louis, and since the statutes contain no prohibition against such holding over in your county, the general rule as set out above would seem to apply and would be consistent with the other enactments of the Legislature, and consequently the committeeman to whom you refer would hold his office until his successor is duly elected and qualified.

CONCLUSION

It is the conclusion of this office from the foregoing that the committeeman to whom you refer in your request holds his office until his successor is elected and qualified, and that he is at present the holder of the office of Republican Committeeman.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Very truly yours,

John M. Dalton
Attorney General

COUNTIES:
COUNTY COURTS:
COUNTY POORHOUSE
AND INFIRMARIES:

- (1) County court has authority on behalf of its county to acquire site for county poorhouse or infirmary.
- (2) Such site need not be within the corporate limits of the county seat of such county.

April 11, 1955

Honorable William L. Hungate
Prosecuting Attorney
Lincoln County
Suite 102 - Troy Building
Troy, Missouri

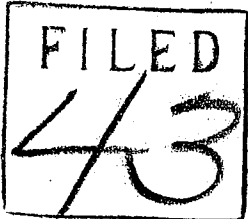
Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

"I would appreciate your opinion on the following question. Does a County Court have power to acquire unimproved real estate for the purpose of erecting a County Poorhouse or Infirmary? I have assumed the answer to this question is 'yes' relying on the provisions of Section 49.350 of the Revised Statutes of Missouri for 1949. My next question is: May land a County acquires for such a poorhouse or infirmary site be located anywhere within its territorial limits, or must such a site be located within the original town or corporate limits of the County seat?

"It is the second question which is giving me a great deal of difficulty in view of Sections 49.370 and 49.380, the Revised Statutes of Missouri for 1949.

"I suppose it is as common throughout the State as it is in this section of Missouri that most counties either do own or have owned institutions known as the County Poor Farm. Naturally, these farms were normally located out in the County and seldom, if ever, located within the corporate limits of the County Seat. Under the present rules of the Federal and State Welfare Departments, it is highly advantageous to the various counties to dispose of these old farms and to acquire more modern buildings on smaller tracts of land for the care of our increasing aged population. The occupants of such places receive



Honorable William L. Hungate

better treatment and care and the County reaps large financial benefits in that such an institution may then be licensed privately and a major portion of the costs of caring for the patients is borne by the State and Federal Governments. These institutions are also then subject to inspection by the State, whereas County operated institutions are not. This, too, tends to result in a higher standard of care.

"Our County Court has inspected and discovered several desirable sites with all modern facilities readily available but none of these more desirable sites are located within the corporate limits of the County Seat.

"I think you will note that the history of Section 49.350 indicates the provision whereby Courts were empowered to purchase poor house or infirmity sites for the County was first enacted in 1909, while Sections 49.370 and 49.380 were first enacted in 1825 and 1820 respectively. It would thus appear that they were primarily concerned with jails and courthouses at the time of their enactment and such a requirement could be readily understood and I wondered if perhaps Section 49.350 passed in 1909 had repealed or supplanted Sections 49.370 and 49.380 by implication at least insofar as poorhouse and infirmity sites are concerned.

"Thanks for your consideration of this question. With kind regards, I am."

Your first question we believe to be answered by the provisions found in Section 49.350, RSMo 1949, reading in part as follows:

"The county court of any county in this state shall have power to acquire by purchase, for such county improved or unimproved real estate for a site for a courthouse, jail or poorhouse or infirmity; * * *"

Here is a clear delegation of authority to the county court to acquire unimproved real property for the purpose mentioned in your request. The language is definite and unambiguous and in the

Honorable William L. Hungate

circumstances no occasion arises for construction of the statute. In this regard your attention is directed to what was said by our Supreme Court in *State ex inf. Rice ex rel. Allman et al. v. Hawk, et al.*, 228 S. W. (2d) 785, from which we quote, l.c. 789:

"* * * The language of the statute is clear and unambiguous, and we have no right to read into it an intent which is contrary to the legislative intent made evident by the phraseology employed. *State ex rel. Jacobsmeyer v. Thatcher*, 338 Mo. 622, 92 S. W. 2d 640; *St. Louis Amusement Co. v. St. Louis County*, 347 Mo. 456, 147 S. W. 2d 667. * * *

In regard to the second question presented in your opinion request it is thought best to first call attention to Section 205.640 of Chapter 205, the County Health and Welfare Chapter in the RSMo 1949. This section was originally enacted in 1845. It is as follows:

"The several county courts shall have power, whenever they may think it expedient, to purchase or lease, or may purchase and lease, any quantity of land in their respective counties, not exceeding three hundred and twenty acres, and receive a conveyance to their county for the same."

The next succeeding section of the County Health and Welfare Chapter, Section 205.650 also originally enacted in the laws of 1845, is as follows:

"Such county court may cause to be erected on the land so purchased or leased a convenient poorhouse or houses, and cause other necessary labor to be done, and repairs and improvements made, and may appropriate from the revenues of their respective counties such sums as will be sufficient to pay the purchase money in one or more payments to improve the same, and to defray the necessary expenses."

In the event the authority for the acquisition of a county poor farm was not taken from the express wording of Section 49.350 supra, such authority could be considered as expressly granted by the two above sections. It is found that Section 49.350 was enacted in 1909. Sections 205.640 and 205.650 were enacted in 1845 and were incorporated in the portion of the laws concerning support

Honorable William L. Hungate

of the poor by the counties.

Section 49.350 RSMo 1949 was originally enacted in 1909 and is partially quoted here for reference. It is as follows:

"The county court shall have power to acquire by purchase, for such county, improved or unimproved real estate for a site for a court house, jail or poorhouse or infirmary; or, when the county owns such sites, to acquire by purchase improved or unimproved real estate as an addition to or enlargement of the same."

The remainder of the section then empowers the county court to acquire the needed property by condemnation, if necessary. It is difficult to imagine that such authority had not been previously vested in the court. Historically this section was first enacted in 1909. That power of the county court may have existed previously. However, it does not concern the present question.

The same chapter of the Revised Statutes of 1949 contains, in regard to the powers of the county court, the following Section 49.370:

"The county court shall designate the place whereon to erect any county building, on any land belonging to such county, at the established seat of justice thereof."

The history of this section shows that it is from the Revised Statutes of 1825, page 258, Section 3. The reason for this section's direction to county courts is apparent. In State ex rel. Norman v. Smith, 46 Mo. 60, l.c. 64, in regard to the location of a court house, the court said:

"The record here declares the fact to be that buildings were erected at the original county seat, and had been in steady and constant use for about seventeen years.

"Can it be said that the railroad addition to which the sittings of the court has been removed is the seat of justice, within the meaning of the law? It is true that an addition to a town for some purposes becomes a part of the town itself, and, when incorporated, the municipal regulations are generally extended alike to

both. But there are some peculiar circumstances incident to the location of a seat of justice which are not applicable to subsequent additions. Where donations are made as inducements to any particular location, they are founded upon a supposed advantage that will accrue in favor of the place selected. Upon the idea that the county buildings will remain, and the location be permanent, people invest their money and acquire property; and to allow a court, without pursuing the course provided by law, to change the sessions to some other or rival location, would be a breach of faith and an act of injustice.* * *

It can be seen from the context of the above quotation that there is definite reason for the courthouse to be located at the seat of justice of the county. It may as easily be realized that the county jail be so located. However in regard to county poorhouses Section 205.640, supra, was first enacted in 1845, permitting the county court to purchase or lease land - "not exceeding 320 acres." It required the land to be "in the respective counties."

Section 205.650 supra, enacted at the same time, 1845, empowers the county court to cause a poorhouse to be erected on the lands so purchased or leased. These two sections, enacted as they were twenty years after the original of Section 49.370 supra, certainly must be interpreted as special statutes and 49.370 as a general one referring to the powers of the county courts generally in regard to county buildings.

It has been often stated that the law does not favor repeal by implication, that statutes relating to the same subject must be treated prospectively and construed together. There is no doubt conflict between the "any county building. . . . at the established seat of justice thereof" of Section 49.370 supra, and "the county court shall have the power whenever they may think it expedient, to purchase or lease any quantity of land in their respective counties, not exceeding three hundred and twenty acres" of Section 205.640 supra. It is not believed that the intent of the legislature was to require the county court to locate the poor farm within the limits of the county seat. An example of court treatment of statutes in a conflict such as above may be found in State ex rel. City of Springfield v. Smith, 125 S. W. 2d 833, 344 Mo. 150, where, at l.c. 154-155, it is said:

"(3) It is familiar doctrine that when there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving

Honorable William L. Hungate

effect to a consistent legislative policy, but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.* * *

It is then believed that the obtention of land and the establishment of a county poor farm may be considered as an exception to the requirement that county buildings be built in the county seat.

CONCLUSION

In the premises, we are of the opinion:

1. That a county court may on behalf of its county acquire unimproved real property to be used as a site for the erection of a county poorhouse or infirmary; and
2. That such site need not be located within the corporate limits of the "county seat" or "established seat of justice" of such county.

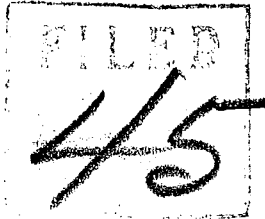
The foregoing opinion, which I hereby approve, was prepared by my Assistant, James W. Faris.

Very truly yours,

JOHN M. DALTON
Attorney General

JWF/ld

MISSOURI STATE PARK BOARD: Missouri State Park Board is authorized
LICENSE: to accept a license to land in a federal
reservoir area for park purposes.



December 5, 1955

Missouri State Park Board
Jefferson City, Missouri

Attention: Mr. Joseph Jaeger, Jr.
Director of Parks

Gentlemen:

This will acknowledge receipt of your request inquiring if the Missouri State Park Board has authority to enter into such a licensing agreement as indicated by the form of a so-called license attached to your request.

The Secretary of the Army by virtue of public laws mentioned in the attached form of licensing agreement is vested with authority to execute a lease or license of certain parts of said reservoir area and, furthermore, preference is given to the states.

Under Chapter 253, Section 253.040, MoRS Cum. Supp. 1953, the Missouri State Park Board is vested with authority to accept or acquire by purchase, lease, donation, agreement or eminent domain any land, or rights in land, sites, objects or facilities which, in its opinion should be held, preserved, improved and maintained for park or parkway purposes. Furthermore, said Board is authorized to improve, maintain, operate and regulate any such land when to do so would promote the park program.

One of the primary rules for construction of a statute is to ascertain the lawmaker's intent from the words used in the statute. *State v. Reynolds*, 274 S.W. (2d) 514.

The word "agreement" is a very ordinary and frequently used word and we hardly deem it necessary to define it, however, Webster's New International Dictionary, 2nd Edition, Unabridged Edition defines agreement, in part, as follows: "State or act of

Missouri State Park Board

agreeing; harmony of opinion, statement, action or character; concurrence; concord; conformity." Notwithstanding that this proposal is referred to as a license, it is also an agreement, and it may be revoked by the licensee upon giving proper notice to licensor. In view of such broad authority granted the Missouri State Park Board by the General Assembly of this state, we believe that such a license is valid and furthermore that the Missouri State Park Board may enter into such agreement.

CONCLUSION

Therefore, it is the opinion of this department that the Missouri State Park Board may execute such a proposed licensing agreement similar to the form of license agreement attached to this request.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:mw

MUNICIPAL CORPORATIONS: Office of police judge in city of
POLICE JUDGE: fourth class incompatible with
COURTS: office of deputy sheriff.
SHERIFFS:
OFFICERS:



August 19, 1955

Honorable John A. Johnson
Senator, 24th District
Ellington, Missouri

Dear Senator Johnson:

This is in response to your request for opinion dated
July 15, 1955, which reads as follows:

"It has come to my attention that a recently elected Police Judge who has assumed the duties of his office is still acting in his former position as a Deputy Sheriff.

"I am of the opinion that this is very much out of order, however I thought your office may have some old opinion or information on this matter. In the event you do not have anything that would cover this point, I would like to hereby request an opinion on this matter.

"The name of this person is Austin Graves, Thayer, Mo., and I am reliably informed that he has been acting as a Deputy Sheriff in addition to Police Judge. He was formerly Marshal of Thayer, Mo., and Deputy Sheriff.

"I trust that your office may be able to furnish me with some information on this matter at an early date."

The precise question presented is whether the office of police judge is incompatible with that of deputy sheriff. To determine that it is necessary to inquire into the duties of the two offices.

Honorable John A. Johnson

It was said in State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 33 L.R.A. 616, at Mo. l.c. 338:

" * * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N.Y. loc. cit. 304:

"Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

The judicial power of the state is vested in municipal courts among others (Sec. 1, Art. V, Const. of Mo. 1945). The judges thereof are commonly called police judges. Among the powers granted to a police judge of a city of the fourth class, into which class we are informed the city of Thayer falls, is that of issuing warrants. Section 98.540, RSMo 1949, provides that such warrants may

Honorable John A. Johnson

be directed to the sheriff of the county among others therein named. That section reads as follows:

"All warrants issued by the mayor or police judge shall be directed to the city marshal, the sheriff or any constable of the county, and such warrant shall be executed by the marshal or any policeman of the city, or by the sheriff or any constable of the county, at any place within the limits of said county, and not elsewhere, unless said warrants are endorsed in the manner provided for warrants in criminal cases, and, when so endorsed, shall be served in other counties, as provided for warrants in criminal cases."

Section 57.270, RSMo 1949, with regard to the powers of deputy sheriffs, reads as follows:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

In State ex rel. Walker v. Bus, supra, the court said, Mo. 1.c. 332:

"Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the circuit court. After appointment and qualification they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' R.S. 1889, secs. 8181 and 8182.

* * * * *

" * * * The deputy sheriff is certainly a public officer under the laws of this state, and his power and authority is coextensive with that of sheriff. State v. Dierberger, 90 Mo. 369."

Honorable John A. Johnson

By virtue of Section 57.100, RSMo 1949, the sheriff is required to "execute all process directed to him by legal authority."

Therefore, there could arise the anomalous situation of the police judge issuing a warrant of arrest to be served by himself as deputy sheriff. He would have the power of passing upon the sufficiency of the return and to allow or disallow his own fees, etc.

An analogous case was presented in State ex rel. Metcalf v. Goff, 15 R. I. 505, 9 A. 226. That case involved the compatibility of the judge of the district court and deputy sheriff. The court said, A. I.C. 227:

" * * * But the incongruity of such offices in one person is manifest. To say nothing of the breach of dignity and propriety which would result from an attempt to perform the duties of judge and officer together, the power of a judge to pass upon the sufficiency of an officer's return, and to allow or to disallow his fees, are quite sufficient to bring these offices within the recognized rule of incompatibility, by reason of the judicial supervision of one office and the accountability of the other. Moreover, in this state, an officer is required to serve any process duly tendered to him, and thus a judge of a district court might have the process of his own court tendered to him to be served, and become liable to a penalty if he did not do it. * * *

"It may be said, however, that the respondent need not, and probably will not, undertake to act in both offices at the same time; but, in the words of Ames, C.J., in State v. Brown, 5 R.I. 1: 'The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices,' and 'the question of incompatibility is to be determined from the nature of the duties of the two offices, and not from a possibility, or even a probability, that the defendant might duly perform the duties of both.'"

Honorable John A. Johnson

Therefore, considering the powers and duties of the two offices and upon the authority of State ex rel. Walker v. Bus, supra, and State ex rel. Metcalf v. Goff, supra, we are of the opinion that the offices of police judge in a city of the fourth class and deputy sheriff are incompatible and may not be held by the same person at the same time.

CONCLUSION

It is the opinion of this office that the office of police judge in a city of the fourth class is incompatible with the office of deputy sheriff and that the two offices may not be held by the same person at the same time.

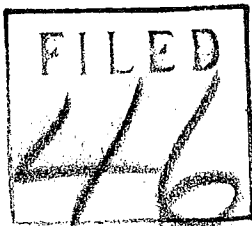
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

INVESTMENT: The Board of Curators of the University of
PUBLIC FUNDS: Missouri may invest funds other than those
UNIVERSITY FUNDS: appropriated by the General Assembly.
UNIVERSITY:
CURATORS:
BOARD OF CURATORS:



December 19, 1955

Honorable DeVere Joslin
Member, House of Representatives
67th General Assembly
602 State Street
Rolla, Missouri

Dear Sir:

This is in answer to your recent request for an official opinion of this office, which request reads as follows:

"The business manager of the School of Mines has withdrawn over \$600,000.00 from our two banks and I understand the banks in Columbia have been drawn on, for the purpose of investing University funds in short time Government securities. I presume this action has been made with the consent of the Board of Curators of the University."

We are advised that the money invested by the Board of Curators was derived from sources other than funds appropriated by the General Assembly of the State of Missouri, being primarily an accumulation from incidental fees, the operation of the institutions at Rolla and Columbia, and perhaps (it is not certain) funds from federal grants.

Section 15, Article IV, Constitution of Missouri, requires that all revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury and be deposited by the treasurer in depositaries selected according to law. It appears that the money invested by the Board of Curators of the University of Missouri from the sources mentioned is not required to be transmitted to the state treasury under this

Honorable DeVere Joslin

constitutional provision on the authority of the decision of the Missouri Supreme Court en banc in the case of State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 264 SW 698, and State ex rel. Curators of University of Missouri v. McReynolds, 193 SW2d 611, 354 Mo. 1199. The decision in the Thompson case, supra, while applicable specifically to the State Teachers' College, was decided upon principles which could likewise govern the same question as applied to the University. This case points out the history of these educational institutions; that such funds have never been controlled by legislative enactment, but that they have always been left under the control of and to be expended in the discretion of the authorities of the institution.

This decision of the Supreme Court was by the legislature carried into the provisions of what is now Section 33.080 RSMo 1949, wherein such funds of state educational institutions are specifically exempt from the statutory requirement that all moneys be placed in the state treasury.

The legislature has recognized that various institutions and subdivisions of the state will have funds to be held outside of the state treasury and, in Chapter 110 RSMo 1949, has provided for their safekeeping. Section 110.010 RSMo 1949 (amended in 1955 by Senate Bill 205) provides that "the public funds of every * * * state university * * * which are deposited in any banking institution acting as a legal depository of such funds under the statutes of Missouri requiring the letting and deposit of the same and the furnishing of security therefor * * *" shall be secured as provided in the applicable statutes. It should be noted that this statute specifically enumerates the state university, and that such specific enumeration was contained in the prior enactments of this section.

Sections 110.070 to 110.120 RSMo 1949, inclusive, pertain to deposits by various state institutions and Section 110.070 specifically provides "it shall be the duty of all boards of managers, curators, trustees or other personnel by whatever name called, who have the management of any state institutions, that have the use or custody of any funds * * *" to call for and receive bids for deposit of such funds. The requirement of bids for these deposits has now passed out of the picture since by both state and federal law payment of interest of demand deposits is illegal and has been illegal since 1937. In view of this futility of requiring bids, the legislature in 1937 enacted what is now Section 110.030 RSMo 1949, which provides:

Honorable DeVere Joslin

"The various statutory provisions in relation to the advertisement for and receipt of bids and the award of the funds to the best bidder or bidders for the whole or any part of any of the public funds of the character referred to in section 110.010 shall be applicable only if and when, at the time of said advertisement and award, it shall be lawful for banking institutions to pay interest upon demand deposits, in which event such applicable statutory provisions shall be complied with; but if, at the time of the advertisement for bids or the receipt of bids or the award of funds, it shall be unlawful for depository banks and trust companies to pay interest upon such demand deposits, the award or awards of such funds shall be made in each case, without bids and without requiring the payment of any bonus or interest, by the authority or authorities which are by statute empowered to make the awards of such funds upon bids."

Thus this section requires that the governing body of the institutions shall make the award of such funds without bids. However, it would seem that the other provisions of Sections 110.070 to 110.120 are still applicable. Section 110.110 requires the treasurer of such board to immediately deposit in such depository all moneys that come into his hands. That section reads:

"It shall be the duty of the treasurer of the board of managers, by whatever name called, of such institution, after the selection of such depository or depositories and the approval of their bonds, immediately upon the receipt of any money thereafter to deposit the same with such depository to the credit of such institution, and said treasurer shall, as near as may be, maintain with the depository so selected its due and proper share of the total of the funds let; and for any failure of the treasurer to make transfer of such funds or to deposit all of said funds with said depository, he shall be liable to said

Honorable DeVere Joslin

depository for ten per cent per month upon the part of said funds not so deposited, to be recovered by civil action in any court of competent jurisdiction."

It should likewise be noted that Section 110.120 RSMo 1949, providing a penalty for the violation of the preceding sections, is as follows:

"Any member of a board of managers, curator or regent, officer or employee of any of the eleemosynary, educational or penal institutions of this state who shall knowingly and willfully violate any of the provisions of sections 110.070 to 110.120, and for which no other or different punishment shall be prescribed by law, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county or city jail for not exceeding one year, or by both such fine and imprisonment, and, in addition, shall be removed from his office."

From the foregoing, it would appear that it was the intention of the legislature to require that all moneys coming into the hands of the Board of Curators of the University of Missouri be deposited by the treasurer of the board in depositories selected by the board pursuant to statute. And such statutory requirement, if valid, would seem to preclude the investment of such funds by the Board of Curators, and that, under the statutes, the board would be required to keep such money on deposit until expended for the purposes of the University. However, the Constitution places the government of the University in the Board of Curators, not in the General Assembly. This is accomplished by Section 9 of Article IX, which is identical to the provisions contained in the Constitution of 1875. Such section reads:

"Sec. 9(a).# State university--government by board of curators--number and appointment.--The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

Honorable DeVere Joslin

Under the authority of this constitutional provision and of the prior decision in the case of State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 264 SW 698, the Supreme Court en banc, in the case of State ex rel. Curators of the University of Missouri v. McReynolds, 193 SW2d 611, 354 Mo. 1199, stated "they (the Curators of the University) have sole control and custody of the fees received from dormitories and dining rooms." In this case, the issue was whether or not the curators could issue revenue bonds for the purpose of building dormitories and dining facilities. In considering the case, the court pointed out the history of the University and the fact that for many years after its establishment it operated solely from the proceeds of the seminary fund and such moneys as are here in question in this opinion. As to the history, the court precisely summarized it as follows, l.c. 193 SW2d 611:

"The University of Missouri was created by the General Assembly in 1839. Laws of 1838, p. 173. A fund designated as the 'seminary fund' was established by the act. This fund was to receive the proceeds of the sale of seminary lands and after the principal reached the sum of \$100,000 the income was to be applied for the support of the University. The original buildings were financed and for many years maintained solely from the income from the seminary fund and by gifts, subscriptions and student fees. These funds were paid directly to the curators who had control and management of them. The first funds by way of appropriation by the Legislature came in 1867, Laws 1867, p. 9, and then not for support but to reimburse the University for \$10,000 damage to its property because of military occupation during the war between the States. It appears that it was not until 1879 that the Legislature made its first general appropriation to the University. Laws 1879, p. 5."

The court pointed out that the University was to be contrasted to rather than compared with a municipal corporation which could handle and expend its money only in accordance with specific statutory or charter provisions, and that the University had broad discretion in dealing with funds derived from sources other than taxation

Honorable DeVere Joslin

and which were not appropriated to it by the General Assembly. The court said, 1.c. 193 SW2d 613:

"* * * The broad powers historically exercised by the curators without specific legislative authority or appropriations present a different situation from an ordinary municipal corporation depending entirely upon taxation for its support and with powers rigidly limited by statute or charter."

The constitutional provision vesting the government of the State University in the Board of Curators was specifically construed by the Supreme Court en banc in the case of State ex rel. Heimberger v. Board of Curators, University of Missouri, 268 Mo. 598. In this case the legislature had provided by statute for the giving of additional courses and conferring of additional degrees by the University School of Mines and Metallurgy at Rolla. The University resisted on the express grounds that the constitutional provision we are now construing removed the University from the control of the General Assembly and that, consequently, they were not bound by the legislative enactments in question. The court came to the conclusion that the decision of that question depended upon the meaning of the word "government" as used in the constitutional provision vesting the "government" of the University in the Board of Curators. They pointed out that the normal definition of the word "government" was the "exercise of authority in regulating something; control; direction; rule; regulation;" and since the action of the legislature was in the nature of adding to the establishment rather than controlling or directing the operation thereof, the legislature was not prohibited from making such provision for additional courses and degrees by the constitutional provision. The court said, 1.c. 268 Mo. 621:

"The constitutional powers of the board consist of those which 'government' includes--no more and no less. Except as to those the General Assembly is free to act while the powers conferred are beyond the General Assembly's reach. Before, however, we hold the General Assembly powerless to enact particular legislation, he who asserts such lack of power carries the burden of making his position clear beyond a reasonable doubt. We do not think that has

Honorable DeVere Joslin

been done in this case. Certainly no implication excluding the General Assembly's power to legislate upon subjects of one character can necessarily arise from the fact that authority over subjects of a different character is invested in the board of curators."

Thus the decision which must be made in this opinion is whether or not the matter of investing funds, which would otherwise lie idle in a bank or other depository, so as to secure therefrom additional funds for use in furthering the purposes of the University comes within the constitutional power of "government" of the University so as to authorize such investment in the face of the statutory provisions discussed above. It is clear, of course, that statutes as to the depositing of funds are not an addition to the University establishment so as to come squarely within the holding of the Heimberger case, *supra*. However, that case, by its definition of the word "government" said that it included control, direction, rule and regulation. The funds here in question have historically been in the sole control of the curators who have expended them for the purposes of the University in their sole discretion and without appropriation by the legislature. The General Assembly has never attempted to control their use. The Supreme Court has held that such funds are not within the constitutional provision requiring all state funds to be deposited in the state treasury and the General Assembly has expressly excluded such funds from statutory requirements of deposit in the state treasury. Further, the Supreme Court allowed the curators to pledge future funds of this type by issuing revenue bonds for the present construction of dormitory and dining facilities. It therefore seems that a reasonable construction of the definition of the term "government" discussed above would include the control and investment of the funds we are here considering. Thus, since the matter of investment of such funds comes within the constitutional power of the Board of Curators to govern the University, such matter is by such constitutional provision removed from the field within which the General Assembly may act, and the statutes above discussed can have no force and effect upon the Board of Curators of the University of Missouri.

Conclusion.

It is, therefore, the conclusion of this office that, under the powers granted to the Board of Curators of the University of Missouri by Article IX, Section 9 of the Constitution, the board may invest

Honorable DeVere Joslin

funds in its hands which are derived from sources other than appropriation of the General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:sm

CITIES: : Senate Bill No. 112 of the 68th General
: Assembly which provides, in effect, that
CONSTITUTIONAL LAW: : third class, fourth class and special
: charter cities of Clay and Jackson Coun-
: ties having an organized police and fire
: departments may provide pensions for their
: policemen and firemen, is unconstitutional,
: unless there is some difference between
: those cities in Clay and Jackson Counties
: and other cities of the same type in the
: State, reasonably justifying a differ-
: entiation in the powers granted to such
: cities.



March 17, 1955

Honorable Edgar J. Keating
Member
Missouri Senate
Room 331
State Capitol Building
Jefferson City, Missouri

Dear Senator Keating:

Your letter of March 1, 1955, requesting an
opinion of this office reads as follows:

"I am enclosing herewith copy of
Senate Bill No. 112 which is pend-
ing in the Judiciary Committee of
the Senate. I will appreciate an
opinion as to the constitutional
validity of the rather artificial
classification found in lines 1 to
5 of section 1, page 1, of the bill.
The bill has had one hearing in com-
mittee and has been continued over
for additional hearing after your
opinion is received. I will appre-
ciate receiving this opinion at your
earliest convenience."

The portion of Senate Bill No. 112 of the 68th
General Assembly to which you refer provides, in part:

"Municipal authorities, in all cities
of the third and fourth classes and
special charter in any county having
a part of a city of more than four
hundred thousand inhabitants having
organized police and fire departments,

Honorable Edgar J. Keating:

may provide, by ordinance, for a pension fund for the pensioning of retired, crippled or disabled members of such departments, and the dependent widows and minor children of deceased members. * * *."

It is noted that the Bill does not clearly indicate whether it is applicable to all cities of the third and fourth classes throughout the State, and special charter cities in the type of county specified, or whether the Bill is intended to be applicable only to those third and fourth class and special charter cities in the type of county mentioned. It is our understanding, however, that the Bill was intended to cover only third and fourth class and special charter cities (having organized police and fire departments) in counties having a part of a city of more than four hundred thousand inhabitants.

Article VI, Section 15, Constitution of Missouri, 1945, makes the following provision:

"The general assembly shall provide by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The general assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

The Legislature is prohibited from passing local or special laws in the instances specified by Article III, Section 40, Constitution of Missouri, 1945. That section reads, in part:

"The general assembly shall not pass any local or special law:

* * * * *

Honorable Edgar J. Keating:

"(30) Where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject; (32)."

Although the above provisions seem to require that all cities of a particular class be granted the same powers, the Supreme Court of Missouri has upheld the constitutionality of general laws giving to cities having certain characteristics, powers that are not given to all cities of the same class. The upholding or denial of the validity of such legislative acts is based upon the reasonableness of the classification involved. If there is reasonable basis for the classification, the law is valid. But if there is no reasonable basis, the law must fall. *City of Lebanon vs. Schneider*, 349 Mo. 712, 163 S.W. (2d) 588, and cases therein cited.

Senate Bill No. 112 being applicable only to third class, fourth class, and special charter cities in Clay and Jackson Counties, it must be determined whether there are circumstances justifying the grant of power to pension policemen and firemen in those cities, which circumstances are not present in other such cities throughout the State. We are not aware of any such justifying circumstances, and are, therefore, inclined to the view that the classification in Senate Bill No. 112 is an unconstitutional differentiation between cities of the same class. However, we cannot flatly declare the Bill to be unconstitutional, since at the Committee hearings it may develop that a factual situation exists, which is not apparent to us, that reasonably justifies the granting of the power only to the cities in Clay and Jackson Counties.

It should also be noted that Article VI, Section 25, Constitution of Missouri, 1945, permits authorization

Honorable Edgar J. Keating:

for pensioning only of salaried members of organized police and fire departments. It is suggested that it might be well to specifically limit the plan to such "salaried" members, even though the pension rate is based upon the salary of the member, except for the pension to the widows and children under Section 11.

CONCLUSION

In the premises, therefore, it is the opinion of this office that Senate Bill No. 112 of the 68th General Assembly which provides, in effect, that third class, fourth class and special charter cities of Clay and Jackson Counties having an organized police and fire department may provide pensions for their policemen and firemen, is unconstitutional, unless there is some difference between those cities in Clay and Jackson Counties and other cities of the same type in the State, reasonably justifying a differentiation in the powers granted to such cities.

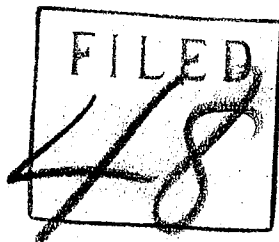
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:irk

SCHOOLS: County bd. of zoning adjustment has no
SCHOOL DISTRICTS: authority to issue special permit to
PUBLIC POLICY: operate trailer court excluding chil-
ZONING: dren; contract between school district
COUNTY BD. OF ZONING ADJUSTMENT: and property owner whereby property
BONDS: owner agrees to forfeit permit to
CONTRACTS: operate trailer court if children are
allowed to reside there void as
against public policy; bond condi-
tioned upon performance of such con-
tractual stipulation also void.



September 8, 1955

Honorable Harry Keller
Member. House of Representatives
1301 E. Armour
Kansas City, Missouri

Dear Mr. Keller:

This is in response to your request for opinion dated
August 15, 1955, which reads as follows:

"FACTS: M. P. Clarkin is the owner of
several acres of ground located in
Jackson County, Missouri. This land is
within the jurisdiction of Reorganized
School District No. 3 of Jackson County.
Mr. Clarkin has applied to the Board of
Zoning Adjustment of Jackson County for
a permit to operate a trailer court on
his said land. Objection to the issuance
of such a permit was raised by the School
District on the grounds that the school
facilities of the district were already
taxed beyond capacity and the addition of
further children into a trailer camp would
create a situation whereby there would not
be sufficient revenue to educate the chil-
dren and would result in classrooms of such
size as to cause the present schools to
become discredited.

"In an effort to avoid such a situation
Mr. Clarkin agreed with the School District
to enter into an agreement whereby he would
not permit children to live in his trailer
court and would rent to adults only, and
orally agreed to and did amend his applica-
tion for a special permit to operate a
trailer court 'so as to apply for a special
permit to operate a trailer court with the
provision that children not be allowed to
live there.'

Honorable Harry Keller

"QUESTION: 1. Does the Board of Zoning Adjustment have the authority to issue a special permit to operate a trailer court excluding children?

"2. Can a School District enter into a valid agreement with a property owner whereby that property owner agrees to forfeit his special permit to operate if such property owner allows children to reside within his trailer court?

"3. Can a School District enforce an agreement with an individual property owner whereby that individual agrees to put up bond to guarantee the performance of a contractual stipulation with the School District that he will not allow children to live on his premises, and then such individual at a future date violates such agreement?"

Question 1. You have informed us by telephone that there is nothing in the master plan of the county adopted by the county planning commission (Sec. 64.040, RSMo 1949) or in the regulations and restrictions ordered by the county court (Sec. 64.090, RSMo 1949) which would purport to authorize a proviso in a permit for a trailer court limiting the occupancy of such trailer court to adults only.

The powers and duties of the county board of zoning adjustment are found in Section 64.120, RSMo 1949. These powers are very similar to those granted to boards of adjustment in cities in counties of ten thousand or more population (Sec. 89.090, RSMo 1949). Under that section it has been held that the board of adjustment has no authority to impose any additional requirement beyond that established by ordinance.

In Fairmount Inv. Co. v. Woermann, 357 Mo. 625, 210 S.W. (2d) 26, 30, the court said:

" * * * The Board had no power to so re-write the ordinance by imposing such additional requirement. * * *"

By the same token, we do not believe that the county board of zoning adjustment would have the power to establish a restriction not required by the body in which the power is vested to

Honorable Harry Keller

make such restrictions. Therefore, the provision in the permit that children not be allowed to live in the trailer court would be of no effect.

Question No. 2. Upon retiring from public life one of the greatest men the world has produced left this parting injunction in the farewell address to his countrymen:

"Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened."

As pointed out in Wright v. Board of Education of St. Louis, 295 Mo. 466, 246 S.W. 43, 27 A.L.R. 1061, the State of Missouri has given its affirmative approval to this fundamental precept in each of its successive constitutions. Section 1, Article IX, Constitution of Missouri, 1945, reads as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. * * *"

Pursuant to that constitutional mandate, the Legislature has from time to time enacted salutary laws for the establishment and maintenance of free public schools. In construing the statutes relating to public schools the courts have recognized it as their duty to construe them liberally so that the advantage of securing an education can be made as free as possible to the boys and girls of Missouri (Northern v. McCaw, 189 Mo. App. 362, 370, 175 S.W. 317).

In the exercise of the authority and duty imposed upon it by the Constitution the Legislature has created school districts (Chapter 165, RSMo 1949) and vested said districts with certain powers and duties. They are public corporations, form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally entrusted governmental function of imparting knowledge and intelligence to the youth of the state that the rights and liberties of the people be preserved

Honorable Harry Keller

(School Dist. of Oakland v. School Dist. of Joplin, 340 Mo. 779, 102 S.W. (2d) 909, 910, and cases cited therein; Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S.W. (2d) 930, 933).

It has been held many times that a school district does not have unlimited powers, but being a creature of the Legislature has only those powers expressly granted to it and those fairly exercised by necessary implication from those conferred (State v. Kessler, 136 Mo. App. 236, 240, 117 S.W. 85; Consol. School Dist. No. 6 of Jackson County v. Shawhan, Mo. App., 273 S.W. 182, 184; Wright v. Board of Education of St. Louis, 295 Mo. 466, 476, 246 S.W. 43; 56 C. J., Schools and School Districts, page 193, Section 46, page 294, Section 152, page 331, Section 202). Section 432.070, RSMo 1949, expressly provides that no school district shall make any contract unless the same be within the scope of the powers of the district or be expressly authorized by law. That section reads as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

At no place in the school laws do we find any authority for a school district to enter into a contract such as the one under consideration which has for its obvious purpose the exclusion of children from the district. On that basis alone we believe we would be justified in condemning this contract. But aside from that aspect of the problem, there is a more conclusive and persuasive one invalidating this purported agreement.

It is well settled that contracts which are contrary to public policy are void (Nute v. Fry, 344 Mo. 163, 125 S.W. (2d) 841, 121 A.L.R. 673; White v. McCoy Land Co., 229 Mo. App. 1019, 87 S.W. (2d) 672, 685). The public policy of the state with regard to public education must be gleaned from the Constitution and statutes and judicial decisions in regard thereto.

As said in White v. McCoy Land Co., 229 Mo. App. 1019, 87 S.W. (2d) 672, 685:

"The only authentic and admissible evidence of the public policy of a state on any given

Honorable Harry Keller

subject are its constitution, laws and judicial decisions. The public policy of a state, of which courts take notice, and to which they give effect, must be deduced from these sources."

In State ex rel. Halbert v. Clymer, 164 Mo. App. 671, 676, 147 S.W. 1119, the Springfield Court of Appeals declared:

"The policy of this state is to educate, and to furnish free of charge, good schools for all children of school age, and even to compel the attendance of children thereto. Section 1 of article 11, of the state Constitution, reads: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years.' It is therefore the duty of the courts to liberally construe our statutes relating to schools, and in such a manner as to open, and not to close, the doors of the schools against the children of the state. As said by the Supreme Court of Wisconsin in State v. Thayer, 41 N.W. 1014: 'Such children are the wards of the state, to the extent of providing for their education to that degree that they can care for themselves and act the part of intelligent citizens. To secure these ends, laws relating to public schools must be interpreted to accord with this dominant, controlling spirit and purpose in their enactment, rather than in the narrower spirit of their possible relations to questions of pauperism and administration of estates.'"

As pointed out above, school districts are mere instrumentalities of the state in discharging the duty of providing free education to the youth of the state. Although they are bodies corporate and constitute separate legal entities, they are statutory trustees for the state in carrying out this important function. In fact, it has been held that the property of a district acquired from public funds is state property, and not the private property of the school district. In School Dist. of Oakland v. School Dist. of Joplin, 340 Mo. 779, 102 S.W. (2d) 909, 915, the court so held:

Honorable Harry Keller

" * * * In Missouri the property of school districts acquired from public funds is the property of the state, not the private property of the school district in which it may be located, and the school district is a statutory trustee for the discharge of a governmental function entrusted to the state by our Constitution."

From the applicable constitutional provisions, the statutes and the judicial decisions above cited, we can only conclude that it is the public policy of this state to provide free education to all children between the ages of six and twenty years and that this interest which society has in the education of the children of the state is paramount to the individual interest of any particular school district. To allow a school district to relieve itself in part of this obligation by prohibiting children from moving into the district would be contrary to the public interest and public policy.

Undoubtedly the officers of this district in entering into this contract have in mind the best interests of the children of the district in seeking to prevent overcrowding of the school-rooms. Meritorious as this objective may be, we do not believe that this is the method which should be or can be employed in relieving the situation. In *Nute v. Fry*, 344 Mo. 163, 125 S.W. (2d) 841, 844, the court said:

" * * * Contracts against public policy should not be ruled according to whether the purposes and objectives are meritorious or otherwise so long as the law holds such contracts void for so to do would permit the governmental functionary charged with the determination of the issue to disregard the mandate of the law and substitute his individual whim as to the meritoriousness of the objectives for the governing principle of law. * * *"

Overcrowding of classrooms is prevalent throughout the state. If one school district can by contract relieve its own individual situation by prohibiting the entrance of children into the district, so can all others in the state. Such a condition would be unthinkable. In this one isolated instance the injury to the public would probably not be very great, but the tendency of such agreements extended over the state and given the stamp of judicial approval would be to thwart the over-all state policy of providing free education. In 13 C. J., Contracts, Section 360, page 425, it is said:

Honorable Harry Keller

" * * * It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law. Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted. * * * The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of its courts. * * *"

Boatmen's Nat. Bank of St. Louis v. Wurdeman,
344 Mo. 573, 127 S.W. (2d) 438, 440.

Therefore, we conclude that the contract under consideration would be void as against the public policy of the state.

Question 3. The bond to which you refer in paragraph 3 of your request being conditioned upon an illegal consideration is void.

In Presbury v. Fisher & Bennett, 18 Mo. 50, 52, the court said:

" * * * The rule is, that where the condition of a bond is entire and the whole be against law, it is void; * * *"

See also 11 C.J.S., Bonds, Section 33, page 416.

CONCLUSION

In the premises, it is the opinion of this office that the County Board of Zoning Adjustment of Jackson County does not have the authority to issue a special permit to operate a trailer court excluding children therefrom.

It is the further opinion of this office that a contract entered into between a school district and a property owner whereby the property owner agrees to forfeit his special permit to operate a trailer court if such property owner allows children to reside within his trailer court is void as against public policy.

Honorable Harry Keller

We are of the further opinion that a bond conditioned upon the performance of such a contractual stipulation is also void as being founded upon an illegal consideration.

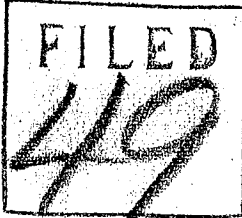
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

JUDGE OF THE JUVENILE COURT
OF JACKSON COUNTY:
DETENTION HOME FOR NEGLECTED
CHILDREN:



The hiring of building and maintenance employees for a place of detention for neglected and delinquent children in Jackson County, resides in the county court of Jackson county and not in the Judge of the Juvenile Court of said county, and therefore the salaries of said employees cannot properly be included in the budgetary request for appropriations of the Judge of the Juvenile Court of Jackson County.

January 18, 1955

Honorable J. Marcus Kirtley
County Counselor of Jackson County
202 Courthouse,
Kansas City, Missouri.

Dear Sir:

Your recent request for an official opinion reads as follows:

"Section 49.270 R.S.Mo. 1949 provides that the County Court shall have control and management of the property, real and personal, belonging to the County.

"Section 211.100 R.S. Mo. 1949 provides that it shall be the duty of the County Court to provide a place for detention for neglected and delinquent children, and further provides that such place shall be in charge of a superintendent and matron to be appointed by the Judge of the Juvenile Court.

"The Judge of the Juvenile Court in Jackson County has included in his budgetary request appropriations for all building and maintenance employees in such detention home, which employees have been named by him.

"The County Court asserts that under Section 49.270, above set forth, it, in the management of a county building, has the right to appoint all building employees and that the appropriations therefor are not to be included in the budget of the Juvenile Court.

"At the direction of the County Court I respectfully request your opinion as to this controversy."

Section 49.270 RSMo 1949, to which you refer, reads:

Honorable J. Marcus Kirtley

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

In our consideration of this matter we are impressed, first, with the fact that the appointive power, in the instant situation, of the Judge of the Juvenile Court, is based wholly upon Section 211.100, supra. That portion of the section which vests appointive power in the judge of the juvenile court is: "Such place or places shall be in charge of a superintendent and matron, or either or both, or other person of good moral character, such person or matron to be appointed by the judge of the juvenile court. The superintendent and matron shall each receive such salary as the judge of the juvenile court may prescribe, the superintendent not exceeding Eighteen Hundred Dollars per annum, and the matron not exceeding Twelve Hundred Dollars per annum, payable monthly out of the funds of the county."

We believe, and will assume, that it was the legislative intent that both the superintendent and the matron be appointed by the judge of the juvenile court. But at that point it would appear that the appointive power of the judge of the juvenile court ended. We believe that the authority of the judge of the juvenile court is strictly limited by statute, and that the judge of the juvenile court can do only what the statute authorizes him to do. That authority, in the instant case, so far as appointment of officers of places of detention is concerned, is limited to the superintendent and the matron. In other words, the judge of the juvenile court can do only what the statutes authorize him to do.

While you do not so state, we assume that the judge of the juvenile court has appointed the superintendent and the matron; that the county court does not contend that he did not have authority to do so; and that so far as the present controversy is concerned, the appointments of the superintendent and the matron are not in issue.

You state further that the judge of the juvenile court has appointed "all building and maintenance employees in such detention home", and that the county court contends that such appointive authority is vested in it and not in the judge of the juvenile court. In this contention we believe the county court to be correct, not

Honorable J. Marcus Kirtley

only because, as we have already pointed out, such power of appointment does not reside in the judge of the juvenile court, for the reasons given by us above, but for the further reason that we believe that such power does definitely reside in the county court.

In this regard we note that Section 49.270¹ supra, states that "the said court (the county court) shall have control and management of the property, real and personal, belonging to the county".

Section 211.100, supra, states that "it shall be the duty of the county court * * * to provide a place or places of detention for children.* * *"

The above statutes charge the county court with the care of county property; such care, of course, involves maintenance; and maintenance involves the hiring of persons to do the maintenance work. Since the charge of maintenance is placed upon the county court, we believe that it follows that the hiring of such maintenance employees resides in and is the responsibility of the county court; in other words, that the authority to hire is implied.

In this respect, we direct attention to the case of Walker v. Linn County, 72 Mo. 650. At l.c. 653, the Missouri Supreme Court stated:

"That a county court is invested with such powers only as are expressly conferred upon it by statute, and such as may be fairly or necessarily implied from those expressly granted, we think cannot be questioned. It, therefore, follows that the question of the power of the county court to bind the county in a contract such as is here sued upon, must be solved by the statute. The statutory provisions bearing upon the subject, are as follows:

'County courts shall, moreover, have the control and management of the property, real and personal, belonging to the county.' Wag. Stat., 441, sec. 9.

'The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their country from waste or damage'. Wag. Stat., 404, sec. 17.

'County courts may appoint an agent to make any contract on behalf of such county for erecting any county buildings; or for any other purpose authorized by law; and the contract of such agent duly executed on behalf of such county shall bind such county.' Wag. Stat., 408, sec. 3.

Honorable J. Marcus Kirtley

"The duty devolved upon county courts in the foregoing sections of taking such measures as shall be necessary to preserve all buildings and property belonging to a county carries with it the power to bind the county in a contract which, in the exercise of the judgment of the court, may seem to be necessary to consummate the object for which the duty was imposed, and which, in point of fact, tends directly to consummate the object. The contract in question is, we think, of this character, and is, therefore, binding on the county, provided it is shown by the evidence that it was either made, or ratified and approved by the court."

In the case of *Aslin v. Stoddard County*, 106 S.W.(2d), the Missouri Supreme Court stated:

"By section 2078, R.S.1929, Mo. St. Ann. sec.2078, p. 2658, it is provided that the county court 'shall have control and management of the property, real and personal, belonging to the county.' This express authority and duty carries with it the necessarily implied authority to employ such labor and service as may reasonably be requisite in order to effectuate the express power granted. Of such character is the work of a janitor, such as plaintiff herein. By the order of court and the contract pursuant thereto employing him he did not become an officer of the county, but only an employee, to whom no attempt was made to delegate governmental or other such functions of the court which from time to time might involve matters of discretion to be exercised by that body. See, on this question, *Manley v. Scott*, 108 Minn. 142, 121 N.W. 628, 630, 29 L.R.A. (N.S.) 652, and notes in latter volume."

In view of the above, we believe that the appointment of the employees in question resided in the county court and not in the judge of the juvenile court, and that, therefore, the judge of the juvenile court was not authorized to include the salaries of such employees in his budget.

CONCLUSION

It is the opinion of this department that the hiring of building and maintenance employees for a place of detention for neglected and delinquent children in Jackson County, resides in the county

Honorable J. Marcus Kirtley

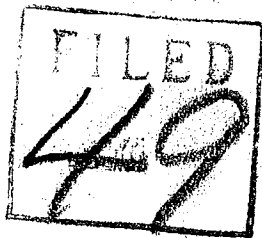
court of Jackson county and not in the judge of the juvenile court of said county, and that, therefore, the salaries of such employees cannot properly be included in the budgetary request for appropriations of the judge of the juvenile court of Jackson county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld



SCHOOLS: Not necessary that board of education in
SCHOOL DISTRICTS: reorganized school district designate
COUNTY SUPERINTENDENTS: boundaries of voting precincts. In election
COUNTY CLERK: of county superintendent, county clerk should
ELECTIONS: deliver to president or clerk of board tally
sheets of size and number sufficient to contain names of all qualified voters of district. If district in three counties, should deliver three sets of tally sheets for each polling place.

March 21, 1955

Honorable John C. Kibbe
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

This is in response to your request for an opinion dated January 24, 1955, which reads, in part, as follows:

"Our county superintendent of schools, Mr. Alfred Lloyd, has requested that I make inquiry concerning some questions arising in regard to the election of such county superintendents this coming April. Our Tipton school district has pupils from a total of three counties. The statute says that the board may designate one or more voting places, and it might designate voting places in each of the three counties.

"Should the board designate the boundaries of voting precincts within its district? The statute is silent on this point in a situation where ordinary precinct lines cannot be extended. For this reason it is difficult for the county clerk to know the probable size of the poll books which he is to furnish.

"In the event that the board designates a voting place at some point outside Moniteau County, where Moniteau County voters do not ordinarily vote, should the Moniteau County Clerk send poll books to such voting place?"

The Tipton school district to which you refer is a re-organized district and governed by the laws applicable to six-director school districts. Hence, your request involves the interpretation and construction of the following two

Honorable John C. Kibbe

statutes: Section 165.330, MoRS, Cum. Supp. 1953, and Section 167.020, RSMo 1949. Section 165.330 reads as follows:

"1. The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at six o'clock a. m. and closing at seven o'clock p. m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records.

"2. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; provided, that in all cities and towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants, said elections may at the option of the board be held at the same time and places as the election for municipal officers with the judges and clerks of such municipal election serving as judges and clerks of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose.

"3. Should such school district embrace terri-

Honorable John C. Kibbe

tory not included in the limits of such city or town, the qualified voters thereof may vote at such voting precinct as they would be attached to, provided the ward lines thereof were extended and produced through such adjoining territory; provided, that in any year in which a county superintendent of public schools is to be elected that the qualified voters of such town, city or consolidated district where registration of voters is required, must vote in the ward or precinct of which they are residents, if the place of voting has been so designated by the board of education; provided, that if there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town and said school election shall be conducted within the limits of such other incorporated city or town in the same manner as hereinbefore provided for cities or towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants.

"4. All school districts in cities, towns and villages in this state which are now or which may hereafter be under special charter shall hereafter hold their annual school elections on the first Tuesday in April, and the members of the boards of education now serving in such districts shall continue to serve until the first Tuesday in April next following the expiration of the terms for which they were elected or appointed, and until their successors are elected and qualified."

Under the above statute the board of education has the authority to designate the polling place or places within the district. It may either conduct the school election in conjunction with the election for municipal officers, in which

Honorable John C. Kibbe

event the voters at the school election would vote in the city precinct in which they live or in which they would be if the ward lines were extended beyond the city limits where the district encompasses territory not included within the city, or it may designate any other place or places within the district. With one exception, the board is not required to designate more than one polling place (Armantrout v. Bohon, Mo. Sup., 162 S.W. (2d) 867). The exception is that if there is any other incorporated city or town within the district there must be at least one polling place in such other incorporated city or town.

If the school election is conducted separately and not in conjunction with the city election, the qualified voters of the district may vote in any polling place within the district so designated by the board of education. If the election is conducted in conjunction with the city election, the statute prescribes the method for determining the precinct in which the voters of the district must vote, i.e., by extending the ward lines beyond the city limits. In either event there is no necessity for the board of education to designate the boundaries of voting precincts.

The remainder of your first question concerning the size of the poll books to be furnished by the county clerk and the second question involve Section 167.020, RSMo 1949, which reads as follows:

"1. At least forty-five days before the annual school meeting in any year when a county superintendent of public schools is to be elected, any person desiring to be a candidate for election to the office of county superintendent of public schools must file with the county clerk a written declaration of his candidacy for the office, which declaration shall be filed by the county clerk and no filing fee shall be charged. At least ten days before the annual school meeting in any year when a county superintendent of public schools is to be elected, the county clerk shall cause to be printed ballots with the names of the candidates who have filed declarations of their candidacy printed thereon in alphabetical order, said ballots to be substantially in the following form:

Honorable John C. Kibbe

OFFICIAL BALLOT

Tuesday, April .. 19..

For County Superintendent of
Public Schools

(Vote for one by drawing a line through
all names except the one voted for)

.
.
.

"2. The clerk of the county court shall cause to be delivered to the president or clerk of the board of school directors of the various districts of the county a sufficient number of ballots for the voters of the district and a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall so far as practical conform to the form of poll book set out in section 111.510, RSMo 1949, relating to general elections; and in making the returns of such election, the tally sheets shall be certified by the chairman and secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same, and it is hereby made the duty of the chairman of the annual school meeting, within two days after such meeting, to transmit the tally sheets and all ballots, in person or by registered letter, to the clerk of the county court; such ballots to be in a sealed package, separate and apart from such tally sheets,

Honorable John C. Kibbe

such package being properly designated. It shall be the duty of the county clerk, within five days after the annual school meeting, to call to his assistance two magistrates or two qualified voters of the county, and cast up the vote and issue a commission to the person receiving the highest number of votes, for which commission he shall receive a fee of one dollar to be paid by the person commissioned. A tie vote shall cause a vacancy in the office of county superintendent, which shall be filled by appointment by the governor, and the person so appointed shall hold such office till the next annual school meeting and until his successor is elected and qualified. In case a school district is divided by a county line, the county clerk shall transmit to the president or clerk of the board of directors of such districts two sets of tally sheets and the voters residing on each side of the line shall vote separately and returns shall be made to each county as herein provided. For transmitting the returns of such election, the chairman of the annual meeting shall receive the sum of one dollar to be paid out of the incidental fund of the district.

"3. The provisions of this chapter shall, so far as practicable, apply to village and city elections so far as affects the election of county superintendent of public schools and so far as not conflicting with existing laws, which are sufficient to safeguard such elections. Any person, upon whom there is imposed an official duty by this chapter, and who shall violate any of the provisions herein, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment."

Honorable John C. Kibbe

Under this section the county clerk is to deliver to the president or clerk of the board of education a tally sheet of sufficient size to contain the names of all the qualified voters of the district. In case the district is divided by a county line, he is to transmit two sets of tally sheets to the president or clerk of the board because there will be voters from each county voting on the county superintendent of their respective counties.

In this case, however, the district lies in three counties. Although the situation is not expressly provided for in the statute, the intention obviously is in such a case that three sets of tally sheets be provided so that the voters of the district residing in each county may vote on their respective county superintendents.

The tally sheets are not sent directly to the polling places, but are delivered to the president or clerk of the board of education, who in turn delivers them to the polling place or places. For that reason it is not necessary that the county clerk be concerned with the amount of tally sheets distributed to each polling place. His duty is to supply sets of tally sheets sufficient in size to contain the names of all the qualified voters of the district. As a practical matter in this case, if more than one polling place is designated by the board of education, three sets of tally sheets for each polling place should be delivered to the president or clerk of the board of education and the board should indicate to the county clerk the size and number of tally sheets needed.

CONCLUSION

It is the opinion of this office that it is not necessary that the board of education in a reorganized school district designate the boundaries of voting precincts within its district.

It is the further opinion of this office that in elections of county superintendents of schools the county clerk should not send tally sheets directly to the polling place or places within the district, but should deliver to the president or clerk of the board of education of the school district tally sheets of a size and number sufficient to contain the names

Honorable John C. Kibbe

of all the qualified voters of the district. Where a district lies in three counties, three sets of tally sheets for each polling place designated by the board of education should be delivered by the county clerk to the president or clerk of the board.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

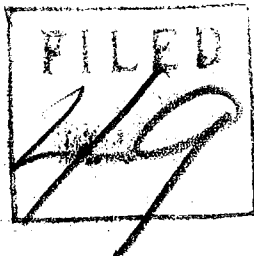
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml:lc

PROSECUTING ATTORNEYS:
FORFEITURES:
SCHOOLS:

The prosecuting attorney of the county is not required to bring a civil action for forfeitures provided under Sections 445.070, .080 and .090, RSMo 1949. Such forfeitures in this case are for the reorganized school district.



May 11, 1955

Honorable John C. Kibbe
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"I am interested in a construction of 1949 MRS Section 445.070, Subsection 1, and Section 445.090, which provide a forfeiture of a sum not to exceed \$300.00 for selling a city lot, before such lot is platted, and Section 445.080, which provides that any forfeiture may be recovered by civil action in the name of the county to the use of the school fund. From the paucity of case law construing these sections, it would appear that they have not been used to any great extent. Our city council here in California does wish enforcement of these statutes in the future, and I wish to request your opinion concerning the following questions:

- "1. Is the forfeiture provision constitutional?
- "2. Is it the duty of the prosecuting attorney to file civil actions to enforce such forfeiture?
- "3. When the school district involved is a reorganized district, of which only part is within the city limits, is the

Honorable John C. Kibbe

forfeiture still recovered for the use
of such district?

"Your opinion concerning these matters will
be greatly appreciated."

You first inquire as to the constitutionality of said forfeiture provisions. It appears to be constitutional; however, we are not passing on that particular question, as it has long been the policy of this department to decline to pass upon the constitutionality of statutes and presume that all laws are constitutional until held otherwise by the courts, except on possibly a few questions of grave importance to many persons and occasional requests from the General Assembly as to the constitutionality of statutes and proposed legislation necessary for enacting laws.

Volume 50, American Jurisprudence, Section 170, pp. 149-150 lays down the general rule as follows:

"The rule that every legislative act is
presumed to be constitutional, and that
every intendment must be indulged by the
courts in favor of its validity, * * *"

Volume 43, American Jurisprudence, p. 97, Section 284, in part reads:

" * * * According to the view generally
taken, judicial officers are protected from
liability for judicial acts even though
done under the authority of invalid or un-
constitutional statutes or ordinances. * * *"

Furthermore, Southerland on Statutory Construction, Volume 1, Section 1706, reads in part:

" * * * In deciding the constitutionality
of a statute alleged to be defectively
titled, every presumption favors the
validity of the act. * * *"

You next inquire whether it is the duty of the prosecuting attorney to file a civil action to enforce such forfeitures. The particular statutes relating specifically to such forfeitures are Sections 445.070, 445.080, and 445.090, RSMo 1949. The former statute, in subsection 1 thereof, provides for a forfeiture not exceeding \$300.00 against any person selling or offering to sell any lot prior to the making of a plat, acknowledging and recording same. The second statute relates specifically to the making of an imperfect map or plat, which does not set forth and describe all parcels of ground which have been or shall be promised or set apart for public uses. Furthermore, said statute provides the procedure for recovering forfeitures arising

Honorable John C. Kibbe

under Chapter 445, which shall be by civil action in the name of the county to the use of the school fund of the incorporated city, town or village in which the land lies or the county, as the case may be. The latter statute, Section 445.090, provides that such forfeiture may be recovered by attachment or otherwise in like manner and for like causes as in ordinary cases.

These sections read as follows:

445.070

"1. If any person shall sell or offer for sale any lot within any city, town or village, or any addition thereto, before the plat thereof be made out, acknowledged and recorded, as aforesaid, such person shall forfeit a sum not exceeding three hundred dollars for every lot which he shall sell or offer to sell.

"2. Such maps or plats of such cities, towns, villages and additions made, acknowledged, certified and recorded, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein named, described or intended for public uses in such city, town or village, when incorporated, in trust and for the uses therein named, expressed or intended, and for no other use or purpose.

"3. If such city, town or village shall not be incorporated, then the fee of such lands conveyed as aforesaid shall be vested in the proper county in like trust, and for the uses and purposes aforesaid, and none other."

445.080

"If any person, his agent or attorney, shall cause a map or plat of any such city, town, village or addition thereto to be recorded, which does not set forth and describe all parcels of ground which have been or shall be promised or set apart for public uses, such persons shall forfeit double the value of the ground so promised or pretended to have been set apart for public uses, and

Honorable John C. Kibbe

not set forth on the plat. The forfeitures arising under this chapter may be recovered by civil action, with costs, in the name of the county to the use of the school fund of the incorporated city, town or village in which the land lies, or the county, as the case may be."

445.090

"The property and effects of the person incurring such forfeiture may be proceeded against, by attachment or otherwise, in like manner and for the like causes as in ordinary cases."

Under Section 56.060, RSMo 1949, listing the official duties of the county prosecuting attorney, it requires him to commence and prosecute all civil and criminal actions in their respective courts in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state and county.

This opinion request specifically refers to city lots in the city of California, Missouri, a city of fourth class; therefore, this opinion rules only as to duties of the prosecuting attorney in such regard.

The foregoing statute, Section 445.080, provides this action for forfeiture shall be in the name of the county for use of the school fund of the incorporated city, town or village wherein the land lies. The county or state is not directly the beneficiary of any such forfeiture, but the beneficiary is the school board wherever said land may be located. Therefore, in view of this construction, we are forced to the conclusion that Section 56.060, supra, is not authority for requiring the county prosecuting attorney to prosecute such forfeitures as one of his statutory duties.

Since the property in question is partly within the city of California, Missouri, and the schools in that city belong to and are within a reorganized school district, we are of the opinion it should go to the reorganized school district.

Honorable John C. Kibbe

CONCLUSION

Therefore, it is the opinion of this department that it is not the statutory duty of the county prosecuting attorney to proceed to bring a civil action of this nature for the recovery of forfeitures under the foregoing statutes, where the land in question is in an incorporated city; that such forfeitures should be instituted by the beneficiary, in this instance, the reorganized school district. Furthermore, when and if such forfeiture is recovered, in this instance it shall go into the fund of said reorganized school district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARR/vtl

ELECTIONS:
SPECIAL:
SENATE BILL NO. 3
68th GENERAL ASSEMBLY:
COSTS TO BE FINALLY PAID
BY STATE:

) Senate Bill No. 3, 68th General
) Assembly, relates to appropriation
) of State School Funds. By Section B,
) Act submitted to all voters of State
) at special election on October 4, 1955,
) under referendum provisions of Con-
) stitution. If no other question to
) be voted on, election costs shall
) finally be paid by State of Missouri.

Each political subdivision of State to pay cost of holding election therein. Thereafter, it may present claim for reimbursement to State Comptroller, who shall audit same. State Treasurer is then authorized under Section 111.405, RSMo Cumulative Supplement 1953, to pay amount claimed and found due each political subdivision out of any moneys appropriated by Legislature for that purpose.

July 27, 1955

Honorable J. Marcus Kirtley
County Counselor
Jackson County
Suite 202, Court House
Kansas City, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion reading in part as follows:

"I am informed that Senate Bill No. 3, commonly known as the school foundation bill, was passed by the Sixty-eighth General Assembly. Section 3 of said act provides that a special election shall be held on October 4, 1955, submitting said act to the voters of the State for approval or rejection. I am further informed that this Bill does not require approval by the Governor with reference to the referendum.

* * * * *

"I would like to inquire whether or not the Sixty-Eighth General Assembly appropriated money for the purpose of the election. In the event that they did not, how will the election on October 4, 1955, be paid for?

"For your information, the cost of such election was not anticipated by this county and it was not known at the time the budget was set that such election would be held. I would

FILED

49

Honorable J. Marcus Kirtley

like to point out that the title of Section 111.405 provides 'An Act providing that the state shall pay all election costs of any election wherein only a state-wide question is submitted.' It would seem to me that by virtue of the title of the section, plus the language above quoted, that the obligation of the state to appropriate the money and pay for such election is mandatory. Actually, if the Sixty-Eighth General Assembly appropriated the money for the election, there is no question but my inquiry here is directed to the situation that arises in the event such appropriation was not made."

Upon inquiry at the State Comptroller's office we have been informed that no funds have been appropriated by the Legislature to meet said election expenses, therefore, the discussion herein will be in regard to our construction of Section 111.405 RSMo Cumulative Supplement for 1953, page 168, and how such election expenses shall be paid. Said section reads as follows:

"That hereafter when a question is submitted to a vote of all of the electors throughout the state, and no other question is submitted for a vote at the same election, all costs of such election shall be borne by the state, and after audit by the state comptroller, the state treasurer shall pay the amounts claimed by and due the respective political subdivisions out of any moneys appropriated by the Legislature for that purpose."

In this connection and before proceeding further we also desire to call your attention to Section B of Senate Bill No. 3, which reads as follows:

"This Act is hereby submitted to the qualified voters of this state for approval or rejection at a special election which is hereby ordered and which shall be held and conducted on the 4th day of October, 1955, pursuant to the laws and constitutional provisions of this state applicable to general elections and the submission of referendum measures by initiative petitions and it shall become effective when approved by a majority of the votes cast thereon at such election and not otherwise."

Honorable J. Marcus Kirtley

Section 111.405, supra, clearly states that when a proposition is submitted to all of the voters of the State, that is, on a State-wide basis, and no other question is submitted at the same election, all costs of holding the election shall be borne by the State. Nothing in this or any other statute indicates that it is the duty of the General Assembly to appropriate the necessary funds prior to the election, and apparently the time when the appropriation shall be made has been left to the discretion of the lawmakers. Logically an appropriation to take care of all costs of holding such an election could not be made until after the election has been held and each political subdivision of the State in which the election was held has sent in its claim for expenses. The Legislature would then be apprised of the total cost of the election and could make an appropriation for the exact amount of such costs.

As we construe Section 111.405, supra, the cost of holding a special election must be paid by a county or other political subdivision of the State in which the election is held. In other words, the costs of said election must be advanced by the political subdivision, and in the instance referred to in the opinion request it would be Jackson County. Afterwards the respective political subdivisions may make claim to the State Comptroller for reimbursement of all funds they have been required to advance to meet the expenses of the special election. The political subdivision will then be repaid out of any funds appropriated by the General Assembly for that purpose as provided by Section 111.405, supra.

You indicate that your county court has not anticipated, nor included the cost of holding the special election referred to in Senate Bill No. 3, (we assume you refer to the 1955 budget for Jackson County), as such cost was not known at the time the county court approved the budget. While we understand and appreciate the facts which did occur in setting up the budget, it is believed that insofar as the law is concerned, the fact that the election expense, (which the county must pay, or rather advance), is a valid obligation of the county, and is included in the budget by operation of law regardless of whether or not it has actually been so included. This principle has been held to be the law in Missouri upon numerous occasions, and this department has also given its opinion to Honorable W. D. Settle, Prosecuting Attorney of Howard County, upon March 10, 1949, in which the same principle was involved, and cases were

Honorable J. Marcus Kirtley

cited in the opinion upholding said principle. The opinion held that when a special election was required to be held, in Howard County, even though no funds had been provided for the election expenses in the budget, the election must be called and the costs of same were included in the county budget by operation of law. We are enclosing a copy of that opinion for your consideration.

It is therefore our thought that Jackson County is required to pay the costs of holding the special election ordered by Section B, Senate Bill No. 3, even though such costs were not anticipated or actually included in the county budget at the time the county court approved same, but that said election costs are included in the budget by operation of law.

CONCLUSION

It is therefore the opinion of this department that Senate Bill No. 3 of the 68th General Assembly, relating to the appropriation of the State school money is by Section B of the act, ordered submitted to a vote of all the electors of the State for approval or rejection, under referendum provisions of the Constitution at a special election upon October 4, 1955. If no other question is to be voted upon at said election, the cost of same shall finally be borne by the State of Missouri, and each political subdivision of the State shall pay the cost of holding the election therein. Thereafter it will present its claim for reimbursement to the State Comptroller, who shall audit same. The State Treasurer is then authorized, under the provisions of Section 111.405 RSMo Cumulative Supplement 1953, to pay the amount claimed and found due each political subdivision, out of any moneys appropriated by the Legislature for that purpose.

The foregoing opinion, which I hereby approve, was written by my Assistant, Paul N. Chitwood.

Yours very truly,

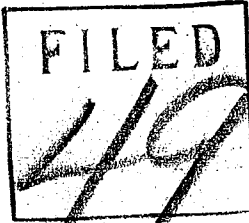
JOHN M. DALTON
Attorney General

ENC:mail gm

Enclosure

URBAN REDEVELOPMENT CORPORATION LAW: Redevelopment project may
be exclusively industrial
or commercial.

September 29, 1955



Honorable Michael Kinney
Member, Missouri Senate
Holland Building
211 North 7th Street
St. Louis 1, Missouri

Dear Senator Kinney:

We have received your request for an opinion of this office, which request reads as follows:

"As you know, the City of St. Louis is vitally interested in the program of Urban Redevelopment. The program is of particular importance to St. Louis because, being surrounded by many municipalities, it cannot extend its boundaries.

"The land clearance for redevelopment authority has acquired property for the first St. Louis redevelopment project. The Board of Aldermen has declared blighted several other areas. These areas are now under study. It is contemplated that, after careful study, a development plan will be approved by the Board of Aldermen which may declare parts of these areas appropriate for industrial or commercial reuse. This will create redevelopment projects which may be exclusively industrial or commercial. The project will be carried out in large measure by redevelopers incorporated under the Urban Redevelopment Corporation's Law.

"Before the city expends large sums to acquire these sites and prepare costly surveys and plans, I would appreciate your opinion on the following two points.

Hon. Michael Kinney

"Is a corporation formed under the Urban Redevelopment Corporation's law authorized to carry out an exclusively industrial or commercial redevelopment project?"

"Is such a corporation entitled to the tax benefits provided by the law, on a project which is exclusively industrial or commercial?"

Section 353.020 of the Urban Redevelopment Corporations Law provides, in part, as follows:

"(1) 'Area' shall mean that portion of the city which the legislative authority of such city has found or shall find to be blighted, so that the clearance, replanning, rehabilitation, or reconstruction thereof is necessary to effectuate the purposes of this law. Any such area may include buildings or improvements not in themselves blighted, and any real property, whether improved or unimproved, the inclusion of which is deemed necessary for the effective clearance, replanning, reconstruction or rehabilitation of the area of which such buildings, improvements or real property form a part;

"(2) 'Blighted area' shall mean that portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration, have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes;

"(4) 'Development plan' shall mean a plan, together with any amendments thereto, for the development of all or any part of a blighted area, which is authorized by the legislative authority of any such city;

"(8) 'Redevelopment' shall mean the clearance, replanning, reconstruction or rehabilitation of any blighted area, and the provision for such industrial, commercial, residential or public structures and spaces as may be appropriate, including recreational and other facilities incidental or appurtenant thereto;

Hon. Michael Kinney

"(9) 'Redevelopment project' shall mean a specific work or improvement to effectuate all or any part of a development plan;

"(10) 'Urban redevelopment corporation' shall mean a corporation organized under the provisions of this chapter, provided, however, that any life insurance company organized under the laws of, or admitted to do business in the state of Missouri may from time to time within five years after the effective date of this law, undertake, alone or in conjunction with, or as a lessee of any such life insurance company or urban redevelopment corporation, a redevelopment project under this chapter, and shall, in its operations with respect to any such redevelopment project, but not otherwise, be deemed to be an urban redevelopment corporation for the purposes of this section and sections 353.010, 353.040, 353.060 and 353.110 to 353.160, RSMo 1949."

Section 353.030, RSMo 1949, which sets out the contents of the articles of association for redevelopment corporations, provides, in part, that they shall contain:

"12. A declaration that such corporations are organized for the purpose of the clearance, replanning, reconstruction or rehabilitation of blighted areas, and the construction of such industrial, commercial residential or public structures as may be appropriate, including provisions for recreational and other facilities incidental or appurtenant thereto."

We find no other provision in the Urban Redevelopment Corporation Law (Chapter 353, RSMo 1949) which throws any light upon the question of the type of structures which may be erected and the use of the land in the area to be developed. Both Section 353.020 and Section 353.030, above quoted, refer to "such industrial, commercial, residential or public structure as may be appropriate." There is nothing in the language of the statute which limits the number or type of industrial and commercial structures which may be included in a redevelopment plan. Nor is there anything in the law which provides that the industrial and commercial structures must be part of a redevelopment plan which is primarily, or in any part, residential in character.

Hon. Michael Kinney

The act leaves to the legislative authority of the city the right to authorize development plans. That body must, in the first place, decide whether or not an area involved is a blighted area. It is a matter of common knowledge that urban blighted areas are not limited to residential areas. The Urban Redevelopment Corporations Law does not attempt to make any such limitation. Having decided that an area is blighted, the determination of the type of structures to be erected as a part of the development plan is a matter for the determination of the legislative authority of the city. That body must determine what structures are "appropriate" for particular locations.

In view of the plain language of the statute, authorizing "such industrial, commercial, residential or public structures as may be appropriate," there appears to be no room for interpretation or construction which would impose any restriction or limitation upon the terms employed. The courts have held on numerous occasions that when statutes are clear and unambiguous no resort can be had to matters other than the language of the statute in their construction. Thus, in the case of *St. Louis Amusement Co. v. St. Louis County*, 347 Mo. 456, 147 S.W. (2d) 667, l.c. 669, the court stated:

"We need not conjecture as to the intent of the legislature * * * because we find the language of the statute is plain. And where the language of a statute is plain and unambiguous it may not be construed. It must be given effect as written."

In the case of *State ex inf. v. Hawk*, 360 Mo. 490, 228 S.W. (2d) 785, l.c. 789, the court stated:

"* * * The language of the statute is clear and unambiguous, and we have no right to read into it an intent which is contrary to the legislative intent made evident by the phraseology employed. * * *"

We think that such rule is applicable to the statute under consideration and that there is no basis for the imposition of any limitation regarding the type of industrial or commercial structures which may be erected as a part of the development plan, it being left to the legislative authority of a city to determine the type of structures which might be appropriate for the carrying out of a development plan.

As for your second question, the general scheme for relief from taxation of property of urban redevelopment corporations is set out in Section 353.110, RSMo 1949. Generally speaking, the

Hon. Michael Kinney

scheme provided by that section is for the assessment of the real property of such corporations during the first ten years at a value measured according to the assessed valuation of the land, exclusive of improvements for the year prior to the one in which the land was acquired by the redevelopment corporation. During such ten-year period, no assessment is made of or tax levied against the improvements. For the next fifteen years taxes are measured on assessed valuation of the property and improvements not to exceed fifty per cent of the true value. This plan of relief from taxation is authorized by Section 7, Article X of the Constitution of Missouri, 1945, which provides as follows:

"For the purpose of encouraging forestry when lands are devoted exclusively to such purpose, and the reconstruction, redevelopment and rehabilitation of obsolete, decadent or blighted areas, the general assembly by general law, may provide for such partial relief from taxation of the lands devoted to any such purpose, and of the improvements thereon, by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions, and restrictions as it may prescribe."

Neither the Constitution nor Section 353.110, RSMo 1949, contains any limitation regarding the type of structures which must be erected in order to obtain the benefit of relief from taxation. Under the Constitution, the relief is granted for the "reconstruction, redevelopment and rehabilitation of obsolete, decadent or blighted areas." In our opinion, industrial developments could serve such purposes and, therefore, there would be nothing to prevent the relief being extended under the Constitution. Inasmuch as the Legislature is setting up the plan for relief from taxation has imposed no restrictions, we are of the opinion that the fact that the redevelopment might be exclusively industrial in nature would not deprive the corporation of the benefits of the relief from taxation provided by Section 353.110.

CONCLUSION

Therefore, it is the opinion of this office that a corporation formed under the Urban Redevelopment Corporations Law is authorized to carry out an exclusively industrial or commercial

Hon. Michael Kinney

redevelopment project and that such corporation would be entitled to the tax benefits provided by Section 353.110, RSMo 1949, on a project which is exclusively industrial or commercial.

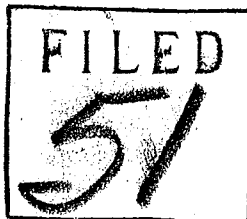
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW/ml/bf

COUNTY TREASURER: County court presumed to have taken increased compensation for county treasurer into consideration when it increased annual compensation.



February 1, 1955

Honorable Robert L. Lamar
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"I have been asked by Mr. Walter Beeler, the County Treasurer of Texas County, for an opinion as to the additional compensation allowed him in connection with the collection of intangible personal property tax under House Bill 199 of the 66th General Assembly.

"The facts are as follows: Mr. Beeler served as County Treasurer from 1949 to 1952, being re-elected in the latter year for another term ending in 1957. Texas County is under township organization. During his first term, his salary as County Treasurer was fixed at \$1900.00 per year. No order by the County Court was entered on the Court record fixing the amount of such salary; however, in all budget estimates during the years of that first term, the item of 'salary' of the County Treasurer was included at that sum under that specific designation. After the passage of H.B. 199, the 'salary' of the County Treasurer was included in budget estimates at the sum of \$2,000.00. The additional compensation provided for by H. B. 199 was never entered in the County budgets under that designation.

Honorable Robert L. Lamar

"During the years 1953 and '54 the same condition continued, the budgets including his 'salary' at \$2,000.00. The same thing is true of the 1955 budget now in preparation. Texas County is a 3rd class county, and it so happens that the 'salary' of \$2,000.00 exactly equals the minimum salary of \$1,200.00 permitted by law in a 3rd class county, plus the \$800.00 extra compensation for additional services provided for in H.B.199.

"Query: Is the County Treasurer of this County entitled to the \$800.00 extra compensation provided for in H.B. 199 over and above the \$2,000.00 'salary' specified in the budget estimates; or is the additional compensation to be included within and a part of such \$2,000.00 salary.

"I would very much appreciate it if you would give me an opinion on this matter, and trust that I have given you sufficient facts on which to base it."

As you have pointed out in your request, Texas County is a county of the third class under township organization. According to the 1950 census, its population was 18,992.

Section 54.320, RSMo 1949, as amended, Laws of Missouri, 1951, page 377, reads as follows:

"The county treasurer in counties of the third and fourth classes adopting township organization shall be allowed a salary of not less than one hundred dollars per month by the county court to be paid as at present provided by law; the ex officio collector for collecting and paying over the same shall be allowed a commission of three per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes; he shall receive nothing for paying over money to his successor in office."

Honorable Robert L. Lamar

The only change made in this section by the 1951 amendment was the addition of the reference found therein to fourth class counties.

House Bill No. 199 of the 66th General Assembly, referred to in your opinion request, is found in Laws of Missouri, 1951, page 867. It imposed upon county treasurers certain additional duties in connection with the handling of intangible personal property tax returns. Section 3 of the act (Sec. 54.275, MoRS, 1953 Supp.) provided as follows:

"For the additional duties imposed upon county treasurers by section 2 of this act, they shall receive the following additional compensation, to be paid in the same manner and from the same funds as county treasurers are now paid provided said treasurers shall have used diligence in securing and preparing the additional list and shall have forwarded the same to the Director of Revenue.

"(1) In class four counties six hundred dollars per annum.

"(2) In class three counties having a population of less than twelve thousand five hundred, six hundred dollars per annum.

"(3) In class three counties having a population of more than twelve thousand five hundred but less than thirty thousand, eight hundred dollars.

"(4) In class three counties having a population of more than thirty thousand, one thousand dollars.

"(5) In class two counties, one thousand dollars.

"(6) In counties under charter form of government a compensation to be fixed by the County Council."

This act became effective on October 9, 1951.

Honorable Robert L. Lamar

In our opinion, the county treasurer would be entitled to receive the proportionate amount of the \$800 therein provided for the period from the effective date of that bill until the end of 1951. The increase having been voted by the Legislature, it would be automatically included in the county budget. See *Gill v. Buchanan County*, 346 Mo. 599, 142 S.W. (2d) 665, 1.c. 668(6-8).

As to the subsequent years, however, we think a different conclusion must be reached. This conclusion is based upon the holding of the Missouri Supreme Court in the case of *Givens v. Daviess County*, 107 Mo. 603. That case involved the salary of the county treasurer under Section 5388, R.S. Mo. 1879. That statute authorized the county court to fix and allow the treasurer as compensation such salary as it should deem reasonable and just. In that case the court discussed the matter of the salary of the county treasurer under said statute as follows, 107 Mo. 1.c. 608:

"A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office. * * * In the absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his duties enlarged without the impairment of any vested right. * * *

"Owing doubtless to great difference in the wealth and revenues of the various counties, the legislature has delegated to the county courts of their respective counties the duty of determining and fixing the compensation of county treasurers by section 5405, Revised Statutes, 1879, which is as follows: 'Unless otherwise provided by law, the county court shall allow the treasurer, for his services under this article, such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor.' Under this section, according to the principles above enunciated, the county court of defendant county had the undoubted

Honorable Robert L. Lamar

right, at least within the limits of reasonableness and justice, to determine the compensation plaintiff should receive for his services as treasurer, and to diminish the same during the term, if in its judgment circumstances demanded a reduction. The action of the county court in previously fixing an annual salary of \$1,500 to this office, whether by merely paying that amount to former incumbents, or by general order, had the effect of attaching to the office of treasurer of that county, and as an incident thereto, a salary of \$1,500 per year. When plaintiff was elected to the office, for the second time, he took, as incident thereto, the right to receive this salary.

"He was entitled to receive the salary as previously fixed, from the time he entered upon the duties of his office, until the expiration of the term unless it was decreased by appropriate action of the county court and he was duly notified of the change.

"As has been seen this right does not rest upon contract, but upon the law, the statute and the action of the county court. As is said in Fitzsimmons v. Brooklyn, *supra*, 'the salary belongs to him as an incident to his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office.'

"The salary to which plaintiff was entitled did not depend, in the least, upon the value of his services, but altogether upon what action the court took in the premises. Every day he held the office the law vested in him a right to a due proportion of the salary, as at that time fixed, and, consequently, an order changing the compensation could not have a retrospective operation and divest from him what was his already. Hence, when the order of December 6 was made, plaintiff

Honorable Robert L. Lamar

had the undoubted right to demand and collect, as salary, at the rate of \$1,500 per year from the commencement of his term, January 24, 1885, to that date.

"We do not think the order had the effect of accomplishing a change in the salary for services subsequent to its date for the reason that the terms used, 'in full of all demands as such treasurer,' does not express such an intention. Those terms imply rather that this payment was in full of salary to that date, but as such a construction would increase the salary, which could not be done under the constitution, (art. 14, sec. 8,) we must infer that it was only intended to cover the salary for two years, leaving the additional period for future adjustment.

"Again, we do not think the existing salary could have been detached from the office without notice to the officer. While the court had the right to decrease the compensation plaintiff had the right, which appears to have been his only remedy, to resign the office if dissatisfied with the change.

"It would have been the greatest injustice to have reduced the salary without notice, and held plaintiff to the reduction. The salary was the most important incident attached to the office, and it should only have been changed by clear and definite action on the part of the county court, and not by implication merely. For these reasons we think the order of the county court insufficient to accomplish a change in the salary."

In applying the principles of the opinion of the court in that case to the present situation, it appears to us that, had the county court made no further order or change in the compensation of the county treasurer subsequent to the effective date of House Bill No. 199 of the 66th General Assembly, the presumption would have arisen that the county court intended to continue the compensation under Section 54.320 at the same rate as it had previously fixed. However, the court did not do so and instead increased the compensation from \$1,900 to \$2,000.

Honorable Robert L. Lamar

As the court pointed out in the Givens case, the constitutional prohibition against the increase in compensation of a county officer during his term (Sec. 13, Art. VII, Missouri Constitution, 1945) would have been violated by the increase in the compensation of the treasurer under Section 54.320 by the county court. See 67 C.J.S., Officers, Section 95, page 342. Inasmuch as such an outright increase would have been contrary to the constitutional provision, we think that the presumption must arise that in changing the compensation of the treasurer from \$1,900 to \$2,000 the county court must have taken into consideration the fact that an increase in his compensation would have been authorized by House Bill No. 199 of the 66th General Assembly. Inasmuch as that act imposed additional duties upon the county treasurer, an increase in his compensation for the performance of such services would not violate the constitutional prohibition above referred to.

Therefore, in the absence of any other circumstances beyond those set forth in your letter, we think that it must be presumed that the county court in changing the compensation of the treasurer after the passage of House Bill No. 199 must have intended to have fixed his compensation under Section 54.320 at \$100 per month and to have provided the \$800 annual additional compensation authorized by House Bill No. 199 of the 66th General Assembly. In this connection it might be pointed out that the courts of this state have held that under a statute which authorizes a body to fix the compensation of a public officer at a certain amount and further specifies a minimum salary where the body fixes no other salary, the officer is entitled to the minimum provided by statute. State ex rel. Walter v. Johnson, 351 Mo. 293, 173 S.W. (2d) 411, 1.c. 414; State ex rel. Koehler v. Bulger, 289 Mo. 441, 233 S.W. 486, 1.c. 489.

This conclusion is based solely on the facts submitted in your opinion request. We do not hold that this result must necessarily follow if there are other facts and circumstances to be gleaned from the budget applications of the county treasurer during the period in question and the deliberations and actions of the county court in passing upon the budget applications of the county treasurer. There might be circumstances which would overcome the presumption which we feel the law requires on the basis of the facts outlined by you.

CONCLUSION

Therefore, it is the opinion of this office that in a county of the third class under township organization where the county

Honorable Robert L. Lamar

treasurer's salary had been fixed at \$1,900 per year, and, subsequent to the effective date of House Bill No. 199 of the 66th General Assembly, was increased during the term of the incumbent to \$2,000 per year, without any breakdown of the amount allowed under Section 54.320, MoRS, and said House Bill No. 199, the presumption arises that the county court intended to allow the county treasurer compensation at the rate of \$1,200 per annum under Section 54.320 and \$800 per annum under House Bill No. 199 of the 66th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

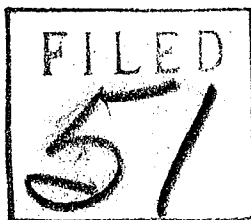
Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

SCHOOLS: TRANSPORTATION:
COUNTY TREASURERS:

The board of education of a reorganized school district is not obligated to send all of the high school pupils within its district to the same high school, although the cost of transporting pupils to one high school may be somewhat greater than the same cost would be in sending such pupil to another high school. A county treasurer is not required to serve as treasurer of a six-member board school district.



February 23, 1955

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I request that your office render an opinion to me concerning the following question of law with respect to the transportation of a high school student. We have a reorganized district here in Andrew County which was formed under the reorganization law and which district is providing free bus transportation for its high school students to the high school located at Savannah, Andrew County, Missouri. This school district has one high school student who is presently enrolled in a high school in St. Joseph in Buchanan County, Missouri. This student is riding a bus which is owned and operated by the St. Joseph Light & Power Company of St. Joseph, Missouri; and the cost of transportation on this privately owned bus to a high school in an adjoining county is slightly more than the cost of transporting students located in the same locale who attend the high school at Savannah in Andrew County, Missouri. We would like to know whether or not the Board of Education of this reorganized district would be legally authorized to pay the excess transportation costs required to transport this student to the neighboring high school in a neighboring county.

Honorable Alden S. Lance

"I further request an opinion as to whether or not the treasurer of a third class county such as Andrew County is legally required to act as treasurer for a six-member board district which has been formed under the following set of facts and circumstances. This six-member board district was formed by a number of common school districts which simply annexed to each other to form a larger district, having within its boundaries an incorporated village. After this enlarged common school district had been formed by the annexation of a number of smaller districts to each other, the large district started electing six members to its Board of Education. Section 165.010, R.S. Mo., 1949 states in Paragraph 3 that 'all districts governed by six directors and in which is located any city of the fourth class or any town or village shall be known as a town school district.' Sections 165.340 and 165.343 seem to indicate that town school districts shall appoint a treasurer who shall be bonded and who may receive up to \$50 per year as pay for his services. Would our County Treasurer be legally justified in refusing to act as treasurer for a six-member board district as described above without compensation and without being bonded?"

The law on the transportation of pupils which we deem to be applicable in your situation is found in Section 165.700, RSMo 1949, and reads:

"In all school districts enlarged under the provisions of sections 165.657 to 165.707, and in all school districts heretofore enlarged and which are hereafter approved by the state board of education as enlarged districts, the board of education is authorized to provide for the free transportation of pupils living more than one mile from any central school building and state transportation shall be granted to such districts in the amount and in the manner as provided in section 165.143."

Honorable Alden S. Lance

Section 165.143, RSMo 1949, referred to above, reads:

"When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state board of education the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state board of education, the amount paid for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of transporting such pupils. When the board of directors of a district that admits nonresident pupils to its high school makes provision for transporting such pupils to such high school, and the method of transporting and the transportation routes are approved by the state board of education before the transportation is begun, the amount spent for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils; provided, any cost incurred for transporting such pupils in excess of three dollars per month for each pupil transported may be collected from the district of the pupil's residence, if said cost has been determined in the manner prescribed by the state board of education; and provided further, that for the transportation of pupils

Honorable Alden S. Lance

attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private school shall be paid as herein provided for the transportation of pupils to public schools."

We call particular attention to the following part of Section 165.143, supra:

"When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state board of education . . ." (Emphasis ours.)

It would appear at first glance that all of the pupils in a district would be sent to the most accessible, adequate school at as small an expense to the district as possible, and that in your situation the pupil who is now attending high school in St. Joseph should be sent with the other high school pupils in the district to the high school in Savannah, which would slightly reduce the total cost of transporting the high school students in the district. However, from the above-quoted portion of Section 165.143, RSMo 1949, it would appear that the law contemplated a situation in which transportation would be paid by the district although not all of the high school pupils from the same district would attend the same school, which is the situation in your case. We can see that in many situations, such as the limited facilities of schools, or of transportation, there might be good reason for sending the high school pupils from the same district to a different high school.

We also direct attention to Section 165.257 RSMo 1949, which reads:

"1. The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and

Honorable Alden S. Lance

attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota, if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year, but the attendance of such pupils shall not be counted in determining the teaching units of the school attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental purposes. In case of any disagreement as to the amount of tuition to be paid, the facts shall be submitted to the state board of education, and its decision in the matter shall be final.

"2. Subject to the limitations of this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil, or shall any school be denied the right to collect tuition from a pupil, parent, or guardian, if the same is not paid in full as herein provided. In no case, however, shall the amount collected from a pupil, parent, or guardian exceed the difference between fifty dollars and the per pupil amount actually paid by the state, nor shall the amount the district of the pupil's residence is required to pay exceed the amount by which the per pupil cost of maintaining the school attended is greater than fifty dollars. If, for any year, the amount collected from a pupil, parent, or guardian exceeds the difference between fifty dollars and the per pupil amount actually paid by the state, the excess shall be refunded as soon as the fact of an overcharge is ascertained."

Honorable Alden S. Lance

We particularly note above that "subject to the limitations of this section, each pupil shall be free to attend the school of his or her choice . . ."

We believe, therefore, that in your case the board of directors may pay the cost of transporting the pupil to St. Joseph to high school, although such cost is "slightly more" than would be the cost of transporting such pupil to the high school in Savannah.

In response to your second inquiry, we enclose a copy of an opinion rendered by this department on September 21, 1949, to Honorable John P. Peters, Prosecuting Attorney of Osage County; also copy of an opinion rendered September 18, 1950, to Honorable H. Tiffin Teters, Assistant Prosecuting Attorney, Jasper County; also copy of an opinion rendered September 21, 1953, to Honorable Albert L. Hencke, Prosecuting Attorney of Franklin County. These opinions fully answer your second question regarding the treasurer of a third class county acting as treasurer for a six-member board school district.

CONCLUSION

It is the opinion of this department that the board of education of a reorganized school district is not obligated to send all of the high school pupils within its district to the same high school, although the cost of transporting pupils to one high school may be somewhat greater than the same cost would be in sending such pupil to another high school.

It is the further opinion of this department that a county treasurer is not required to serve as treasurer of a six-member board school district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

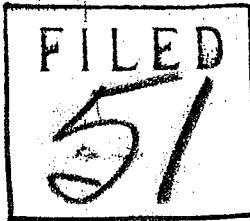
Yours very truly,

John M. Dalton
Attorney General

Enclosures - 9-21-49, John P. Peters
9-18-50, H. Tiffin Teters
9-21-53, Albert L. Hencke

HPW:vlw

COUNTY BUDGET LAW: Obligations incurred prior to December 31 of each year are paid from revenue for year in which they were incurred, and not from anticipated revenue in year in which bill was received.



March 7, 1955

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"I request that your office render an official opinion upon the following questions concerning county government.

"Andrew County, of which I am prosecuting attorney, is a third class county, having a population of between eleven and twelve thousand persons. The county court of this county is anxious to know whether or not third class counties are governed by Section 50.660, Mo. R.S. 1949, which Section pertains to rules governing contracts entered into by counties. Section 50.670 says that it shall be the duty of the county clerk to prepare all data, estimates, and other information needed or required by the county court for the purpose of carrying out the provisions of Sections 50.530 to 50.740. This would seem to indicate to me that it was the intent of the Legislature that third and fourth class counties be governed by Section 50.660, but there seems to be considerable dispute about this matter, and there are no cases which I am able to find that are directly in point, and I would appreciate having your opinion on the matter.

"I would also like an opinion upon the further

Honorable Alden S. Lance.

question concerning the priority of payment of legal obligations incurred by a third class county through its county court under the following set of facts and circumstances. At the close of the calendar year 1954 there were certain outstanding obligations for supplies and materials purchased by the various departments of county government for which bills had not been presented to the county clerk for payment. Sometime during the month of January 1955, prior to the time the budget for the year 1955 had been prepared and approved by the county court, these bills began arriving at the office of the county clerk. I would like to know whether or not these bills for a prior year can be legally paid out of the anticipated revenue for the year 1955 at this time, or must they be held until near the end of the year to be paid out of any unobligated surplus which may be left in the various classes. The county clerk would like to know if the county budget law required him to show in his budget form these obligations for a prior year."

In response to your first question we are enclosing herewith copy of an opinion of this office dated February 16, 1955, rendered to Honorable Harold L. Miller, Prosecuting Attorney of DeKalb County, in which we concluded that Section 50.660, RSMo 1949, does not apply to counties of the third class.

Insofar as your second question is concerned, the following statutory provisions in the County Budget law appear to be relevant in answering it:

Section 50.670, RSMo 1949, provides, in part, as follows:

"* * * The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures

Honorable Alden S. Lance.

for the year beginning January first, and ending December thirty-first. The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year. * * *

(Emphasis ours.)

Section 50.690, RSMo 1949, provides, in part, as follows:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class four and class six.
* * *

Section 50.700, RSMo 1949, provides, in part, as follows:

"Not later than the first day of February of each year after the effective date of this section, the clerk of the county court shall prepare and spread on the docket of the county court the following information and estimate: Tax rate for all revenue purposes for last preceding year as shown by the record, cents per one hundred dollars assessed valuation. Highest rate permitted for county by the constitution per one hundred dollars assessed valuation.

Honorable Alden S. Lance.

Rate of taxation recommended as necessary by the county clerk for current year per one hundred dollars assessed valuation. Rate estimated by county court for current year per one hundred dollars assessed valuation, cents (to be filled in by county court after budget estimate has been approved by the court). Total valuation of all property subject to taxation for last preceding year. Estimated valuation of same for current year. Amount of taxes delinquent January first of current year. Cash balance in county revenue fund January first of current year. Less outstanding warrants for preceding years as follows: (list total by years). Less all known lawful obligations against the county December thirty-first, last, and for which warrants were not drawn at that date (itemized list of these obligations must be attached to the estimate). Total unpaid obligations of the county on January first of current year. (This shall include unpaid warrants and outstanding bills for which warrants may issue.) Net cash balance on hand January first of current year. * * *

(Emphasis ours.)

Section 50.720, RSMo 1949, provides, in part:

"Not later than the fifteenth day of January of each year, every officer who expects to claim pay for services or to receive supplies to be paid for from county funds shall submit to the county clerk the information herein specified. (If state funds are received or expected to be received for all or any part of the expense such shall be considered as county funds for the purpose of this request.) The estimate of each such officer shall cover the entire year beginning January first and ending December thirty-first, both dates inclusive. * * *"

(Emphasis ours.)

Honorable Alden S. Lance.

Section 50.740, RSMo 1949, provides, in part:

"2. * * * The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand.) * * *"

In view of the foregoing provisions as a whole, it is apparent that the Legislature intended the budget to include all items of expense for which the county becomes obligated in the calendar year, although some items of expense might have been incurred at such a late date in the calendar year that payment during such year would be impractical. This conclusion appears to us to be called for by the provisions of Section 50.700, above quoted, which requires the county clerk, in preparing the budget document, to list all lawful obligations against the county as of December 31 and for which warrants had not been drawn at that date. This section requires that the amount of these items be deducted from the amount of cash on hand in ascertaining the cash balance for the county and in setting up the budget for the ensuing year.

In view of this provision, it appears to us that the Legislature contemplated that items of expenditure incurred prior to December 31 of each year should be paid from the county revenue for the year in which the obligations were incurred, and not as of the date on which the bill was submitted to the county. Consequently, in the case referred to by you the obligations should be paid out of 1954 revenue. Should the revenue have been insufficient for such purpose, then payment of such warrants would have to be made from class six in subsequent years whenever any cash balance existed in the county treasury after the payment of all claims under the first five classes.

As for the listing on the budget forms for the obligations of a prior year, it appears to us that Section 50.700, supra, covers this matter and does require an itemized list of these obligations to be attached to the budget document.

Honorable Alden S. Lance,

CONCLUSION

Therefore, it is the opinion of this office that where a county incurs obligations prior to the thirty-first of December and the bills therefor are not received until after December 31, such obligations should be paid out of the county revenue for the year in which the obligation was actually incurred, and should not be paid out of the anticipated revenue for the year in which the bill was actually received. We are further of the opinion that the county clerk is required to show in his budget form the obligations for a prior year for which warrants had not been drawn as of December 31.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Very truly yours,

JOHN M. DALTON
Attorney General

Enc:

RRW:ml:irk

INSURANCE:
BURIAL INSURANCE:

Contract No. 7814 of Leland Carter Burial Association of Mammoth Spring, Arkansas, dated May 3, 1950, is an insurance contract, and offering of the same to the public without complying with insurance laws of Missouri is a violation of Sections 375.300 and 375.310 RSMo 1949.



March 9, 1955

Honorable Robert L. Lamar
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Mr. Lamar:

The following opinion is rendered in reply to your request touching Contract No. 7814, issued by Leland Carter Burial Association of Mammoth Spring, Arkansas, to Clarence W. Sanders of Alton, Missouri, and bearing date of May 3, 1950. The issue to be determined in this opinion is whether Contract No. 7814 is a contract of insurance, the sale of which is prohibited unless compliance is had with the insurance code of Missouri. Investigation discloses that Leland Carter Burial Association of Mammoth Spring, Arkansas, is not licensed to conduct an insurance business in Missouri.

Section 375.300 RSMo 1949, provides:

"Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance division of this state the certificate authorizing him to act as such agent or solicitor, as required by section 375.010, or who shall act as agent or solicitor for any individual, association of individuals or corporation engaged in insurance business, before such individual, association of individuals or corporation shall have been duly authorized and licensed by the superintendent of the insurance division of this state to transact business in this state, or after such license has been suspended,

Honorable Robert L. Lamar

revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

Section 375.310, RSMo 1949, provides, in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, l.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, l.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In the case of State ex inf. v. Black, 145 S.W. (2d) 406, 347 Mo. 19, l.c. 24, the insurance character of burial associations was alluded to in the following language:

Honorable Robert L. Lamar

"The insurance character of this business is recognized by the provision of the act exempting such associations from the general insurance laws."

The insurance character of burial associations is also attested by the following language found in Section 376.020, RSMo 1949, of Missouri's regular life insurance company law:

" * * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Sec. 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

In the footnote to the texts of C.J.S., just quoted, we are cited to the case of State ex rel. Reece v. Stout, 17 Tenn. App., 65 S.W. (2d) 827, in which case the following language is found at 65 S.W. (2d) 827, 1.c. 829:

"Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings,

Honorable Robert L. Lamar

and outfit were to be furnished, by and through a designated undertaker, or official undertaker."

In the case of Knight v. Finnegan (D.C. Mo.) 74 F. Supp. 900, the Court, in the course of defining life insurance, spoke as follows at 74 F. Supp. 900, l.c. 901:

"Moreover, the elements and requisites of an insurance policy are, among others, 'a risk or contingency insured against and the duration thereof.' 'A promise to pay or indemnify in a fixed or ascertainable amount.'"

Contract No. 7814 is quoted in its entirety as follows:

"LELAND CARTER BURIAL ASSOCIATION

MAMMOTH SPRING, ARKANSAS

CHARTERED UNDER THE LAWS OF THE STATE OF ARKANSAS

CONTRACT
NO. 7814

Family Group Burial Certificate

Having paid the required membership fees, and having designated and elected to take a Burial Benefit, and further qualified by promising to be loyal to said Association and governed by its By-Laws is entitled to this Certificate of membership in the Leland Carter Burial Association of Mammoth Spring, Arkansas, and to all the benefits of the Association as set forth in the By-Laws so long as he, she or they shall remain a member thereof. This is to certify that the following members have qualified for membership:

SCHEDULE

Name of Member	Age	Class	Amount of Assessment	Amount of Benefit
Sanders, Clarence W.	53	A	\$.75	\$300.00
Sanders, Evelyn	52	A	.75	300.00
Sanders, Lewis	32	B	.50	200.00
Sanders, Dorothy	30	B	.50	200.00
Sanders, Lester	28	B	.50	200.00
Sanders, Elean	26	B	.50	200.00
Sanders, Bernice	25	B	.50	200.00
Sanders, Leman	23	B	.50	200.00
Sanders, Mary Ann	18	B	.50	200.00

Honorable Robert L. Lamar

Sanders, Clinton	16	B	.50	200.00
Sanders, Betty <u>Nay</u>	14	B	.50	200.00
Sanders, Shirley Ann	10	B	.50	200.00
Total			6.50	

In witness whereof, the signature of the Secretary-Treasurer is hereunto affixed at Mammoth Spring, Arkansas, this the ...3rd.... day of ...May..... 1945..

..Leland Carter.....
Secretary-Treasurer.

BY - LAWS AND REGULATIONS OF

Leland Carter Burial Association

MAMMOTH SPRING, FULTON COUNTY, ARKANSAS

This is a voluntary mutual benevolent association, formed for the purpose of providing proper burial for the members hereof by furnishing funeral services and supplies at a minimum cost to the members and in keeping with proper standards in accordance with the certificate of membership held by said members and the by-laws of this Association. This Association with efficient management, its funds shall be used only for the payment of cost of operation and funeral services and supplies and no profit from the operation of the Association shall accrue or be paid to anyone.

BY-LAWS

1. This association shall be known as the Leland Carter Burial Association and its principal place of business shall be located in Mammoth Spring, Fulton County, Arkansas.

The annual meeting of the Association shall be held on the 1st day of April of each year, at the principal office of the Association in Mammoth Spring, Arkansas, at which meeting each member in good standing in accordance with these by-laws shall be entitled to vote, either in person or by proxy.

(a) Notice of time and place of such meeting shall be given in writing at least fifteen days before the date thereof.

Honorable Robert L. Lamar

(b) A Board of Directors of three members shall be elected at the annual meeting of the Association and they shall serve for a term of one year, or until their successors are elected and qualified. They shall assume office immediately after their election. The Board of Directors shall have full power and authority to manage and direct the affairs of the Association in compliance with the by-laws and are authorized to make any changes in the by-laws which in their opinion appear to be to the best interest of the Association. Any changes made in the by-laws by the Board of Directors during intervals between annual meetings shall be binding upon the Association and its members while in effect, but all such changes made by the Board of Directors may be ratified, modified, or rescinded by the members at the annual meeting.

(c) Any vacancy occurring in the Board of Directors or in any office for any cause shall be filled by appointment by the Board for the remainder of the term.

2. The Secretary-Treasurer shall be the executive officer of the Association, and he shall keep all records, books and accounts, approve or reject all applications and issue certificates of membership, levy and collect all assessments, and do and perform all things necessary or proper in the operation of the Association and to its best interest in accordance with these by-laws and the laws of the state of Arkansas and the rules and regulations of the State Bank Commissioner. He shall make a good and sufficient bond, payable to the State Bank Commissioner for the use and benefit of this Association, in a sum fixed by the said Bank Commissioner, to account for all money and property of the Association coming into his hands.

3. Application for membership shall be made in writing and signed by the applicant or his parents or guardian, shall state the age and condition of health of each person for whom a membership is desired and any misrepresentation in said application as to the age or condition of health of any applicant shall render said application and the certificate of membership issued thereon null and void and the Association shall not be liable for any claim on account of said certificate of membership.

Honorable Robert L. Lamar

4. Certificates of membership shall be issued to each person or group of persons whose application for membership, has been approved and who has paid the membership fee prescribed by the Association for the class of certificate desired. The membership fee shall not be included in the funds of the Association and all or any part thereof may be allowed as compensation to the agent soliciting the membership as the Board of Directors may determine.

CLASS AAA -- \$500 FUNERAL
3 mo. to 60 years of age, \$1.25

CLASS AA -- \$400. FUNERAL
3 mo. to 60 years of age, \$1.00

CLASS A -- \$300 FUNERAL
3 mo. to 60 years of age, 75¢

CLASS B -- \$200 FUNERAL
3 mo. to 60 yrs. of age, 50¢; 60 to 70 yrs of age \$1.50

CLASS C -- \$150 FUNERAL
3 mo. to 60 yrs. of age 40¢; 60 to 70 yrs of age, \$1.20

CLASS D -- \$100 FUNERAL
3 mo. to 6 years of age 25¢

Applicants over the age of sixty, and up to seventy years, will be considered provided other younger members of the family are included on the same application.

6. When a child passes the age of six or twelve years, as the case may be, the parents or guardian of said child shall notify the Secretary-Treasurer so that he may make the necessary changes in the records of the Association and in the Assessments and funeral benefits.

7. The Board of Directors shall direct the Secretary-Treasurer to levy an assessment whenever it appears necessary in order to produce sufficient funds to provide funeral benefits for deceased members, and said assessment shall be made with sufficient frequency to maintain the Association free of debt and provide adequate funds to meet the needs of the Association for cost of operation and funeral benefits between assessments as far

Honorable Robert L. Lamar

as possible. Should any assessment not produce funds sufficient to pay for funeral benefits for deceased members and expense of operation, then the Association shall be liable only to the extent of the funds collected.

8. Each member shall be assessed in the amount specified above as the assessment fee in the class in which he holds a certificate of membership the assessments shall be the same for all members in the same class, and no change shall be made in the amount of said assessment fee while the certificate of membership is in force.

9. Assessments are payable at the office of the Association in cash or by check or money order fifteen days after the date of assessment is levied, and upon failure of any member to pay said assessment within said fifteen days his certificate of membership shall lapse and said member shall not longer be entitled to receive any benefits from said Association. A lapsed member who has been out of the Association less than a year may be re-instated by paying all back assessments and signing an affidavit that he is in good health.

10. The assessment shall be levied against all persons who have been members of the Association for thirty days or more prior to date of an assessment, and the notice of said assessment shall be mailed to the address of the member shown on the application blank unless notice of a change of address has been given to the Association. Notice of change of address should be given promptly to avoid failure to receive assessment notices and consequent failure to pay assessments when due.

11. All funds received by the Association from assessments or any other sources shall be placed in an insured bank to the credit of the Leland Carter Burial Association, and all disbursements shall be by check signed by the Secretary-Treasurer.

12. Upon the death of a member of the Association those in charge of the body of the deceased shall

Honorable Robert L. Lamar

notify the Secretary-Treasurer who shall furnish funeral services and supplies through an undertaker of his choice.

Funeral services and supplies shall be furnished a member of the Association wherever he may be, upon notice to the Secretary-Treasurer. If on account of distance the undertaker customarily employed by the Association cannot service the body of the deceased on account of the distance to be traveled, then the Secretary-Treasurer, whenever advisable, shall employ another undertaker who can service the body.

13. No cash shall be paid to the family or those in charge of the body of the deceased but all amounts for which the Association is liable shall be applied in payment to the undertaker for funeral services and supplies furnished by him. Those in charge of the body of the deceased shall have the privilege of selecting the supplies and determining what services shall be furnished up to the value of the certificate. If services and supplies in excess of the amount to which the member is entitled under his certificate are desired, these can be arranged for by those in charge of the body of the deceased and additional payment made by them.

14. Failure to notify the Secretary-Treasurer of the death of a member before he is buried shall forfeit all right of the deceased to benefit under his certificate of membership. The Secretary-Treasurer shall contract for all debts chargeable to this Association.

15. The Association shall pay all funeral benefits and other expenses promptly as they accure and shall not go into debt for any purpose.

16. The Association shall not borrow money nor shall its assets be pledged for any purpose and at no time shall it be liable on any claim of any nature or amount whatsoever in excess of the proceeds of a single assessment.

17. Expenses of the Association shall be limited

Honorable Robert L. Lamar

to printing, stationery, postage, necessary office supplies, expense and clerical hire, statutory and examination fees and other expenses approved by the Bank Commissioner.

18. The books and records of the Association shall be kept so as to accurately reflect the actual condition of the Association at all times and shall be open for inspection by the examiner of the State Bank Department or by any member of the Association at all reasonable times.

19. Above constitute all the rules and by-laws of the Leland Carter Burial Association.

(On reverse side.)

Endorsements

Leland Carter

Burial Association

Mammoth Spring, Arkansas

No.

7814

FAMILY GROUP BURIAL
CERTIFICATE

Clarence W. Sanders

Payor

Rt. 2 Box 174 Alton, Mo.

Address

DateMay.3..... 19 50..

Honorable Robert L. Lamar

In the event of the death of any insured member, please notify Leland Carter-Secretary-Treasurer, or the office of the Association."

As we view Contract No. 7814, in the light of by-laws and regulations of Leland Carter Burial Association which are made a part of such contract, the Association agrees with the members of the family group named therein, to furnish at the death of any member of such group a funeral service of a definite money value for such member only in the event that the member's definite assessment fees have been paid and his membership has not lapsed, the value of such services bearing no true or correct relationship to the assessments paid.

CONCLUSION

It is the opinion of this office that Contract No. 7814, issued by Leland Carter Burial Association of Mammoth Spring, Arkansas, to a member of said Association in Missouri, and bearing date of May 3, 1950, is an insurance contract, and offering of the same to the public without meeting requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons so offering such contract to be subject to the penalties prescribed by Sections 375.300 and 375.310 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

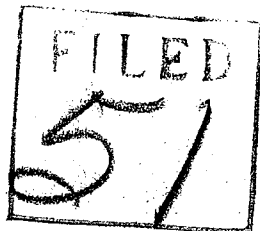
Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

BAIL BOND:
SHERIFFS:
MISDEMEANORS:

Sheriff is not authorized to fix amount of
bond for person arrested without warrant.



September 8, 1955

Honorable Robert Lamar
Prosecuting Attorney
Texas County
Cabeol, Missouri

Dear Sir:

You have recently requested an official opinion from this
office on the following matter:

"We have a problem in this County over the
Twenty-Hour Law due primarily to the loca-
tion here at Cabeol of the Highway Depart-
ment Weight Station. Almost every week-end
one or more out-of-state truckers are found
in violation either on account of overweight
or by reason of some license violation. Our
Magistrate, Mr. Impey, holds that it is
absolutely unlawful for him to hold court
for any purpose on Sunday. Consequently,
it is impossible to get a warrant or get
bail fixed. In such situations local
truckers, or those who pass the scales
regularly, are simply given a summons to
report later. However, in case of those
from a great distance or who are not likely
to pass this way again in the foreseeable
future, it is a problem. When they happen
to be loaded with perishable cargo the
troopers do not like to tie them up until
Monday if it is avoidable. Most Sundays
I am perfectly willing and available for
preparing informations, but that is of
little help in this situation.

"I would very much appreciate it if you
would have an opinion prepared for me in
the light of this case which I mentioned
above, if it can be found, outlining what
our possible remedies may be. If the sheriff,

Honorable Robert Lamar

in case of a man arrested without warrant, after court hours Saturday afternoon can fix bail and take bond, then the violator can either return later or engage an attorney to appear for him without being tied up and his cargo possibly endangered."

It appears to be the well-settled law of this state that, absent statutory authority, a sheriff cannot fix the amount of bail for a person charged with crime or held in custody nor can he approve and take such bail bond before the amount thereof has been fixed absent such statutory authority. See *State v. Walker*, 1 Mo. 546; *State v. Howell*, 11 Mo. 613; *State v. Crosswhite*, 93 SW 247, 195 Mo. 1. It thus becomes incumbent upon us to search the statutes and the rules of the Supreme Court for an answer to your problem. Since, as you point out, it is the fact that court is not in session at the time of the arrest that creates your problem, the statutes and rules pertaining to fixing of bond by the court or the endorsing of the amount of bond on the warrant to be executed by the sheriff are of no help in solving your problem.

Supreme Court Rule 21.14 has to do with arrests of persons without a warrant and it, like Section 544.170 RSMo 1949, limits the time that such person can be held without formal authority to twenty hours. The statute cited makes no provision as to bond during such twenty hour period; however, Supreme Court Rule 21.14 provides:

"If the offense for which such person is held in custody is bailable and the person held so requests, he may be admitted to bail in an amount determined sufficient by a judge or magistrate of a court of such county or of the City of St. Louis having original jurisdiction to try criminal offenses."

(Emphasis supplied.)

Thus it appears that Supreme Court Rule 21.14 only authorizes a judge or magistrate to fix the bond for one held in arrest without warrant. No other rule or statute has been found which would authorize the sheriff to fix such bond. Therefore, it would appear on the basis of the foregoing cases that the sheriff is not authorized to fix such bond.

Honorable Robert Lamar

It might be pointed out that the only situation where the sheriff is authorized to fix a bond is found in the provisions of Supreme Court Rule 32.03 and Section 544.560 RSMo 1949, both considering situations where the defendant is under arrest and in custody by virtue of a warrant charging a misdemeanor and where the amount of bail is not specified on such warrant. Then if, and only if, the judge or magistrate is not in the county, the sheriff or other peace officer may admit the defendant to bail in an amount not less than one hundred dollars or more than one thousand dollars. These provisions afford no solution to your problem since they apply only when one is held by virtue of a warrant duly issued upon a complaint, information or indictment.

CONCLUSION.

It is, therefore, our conclusion, based upon the foregoing, that one arrested without a warrant may not be admitted to bail except by the judge or magistrate under the provisions of Rule 21.14 above set out.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:sm

COUNTY BUDGETS:
UNBUDGETED REVENUE:

A county court can use unbudgeted revenue, which is part of the Class 6 fund, to pay off an emergency expense budgeted under Class 5 of the budget law if there are not sufficient funds in Class 5 to pay the expense, and if there are cash funds on hand sufficient to pay all claims provided for in Classes 1, 2, 3, 4 and 5 together with any expenses already incurred under Class 6 and if all outstanding warrants constituting legal obligations are paid.



September 29, 1955

Honorable Robert L. Lamar
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"A situation has arisen between the County Court of this County and the County Clerk, who is by law in this class county made the budget officer, which seems to call for an opinion from your office.

"On January 1, 1955, there was available in cash in the County Treasury, unencumbered and unpledged, \$85,781.97. The final budget, made up by the County Court and County Clerk, covering estimated expenditures for 1955, totaled \$80,456.82, leaving a net surplus of \$5,325.15. These figures have no reference whatever to estimated tax revenues for the year 1955, all being net surplus carried over from previous years.

"The County Court, in preparing its budget, made no allocation whatever of funds to Class 6 expenditures contemplated in Section 50.680 and 50.710, the \$5,325.15 balance being simply carried as unbudgeted surplus.

"Since the first of the year an emergency situation has arisen; the roof of the County Court House, with the beginning of hot weather,

Honorable Robert L. Lamar

deteriorated to such an extent that the records in the office of the Probate Court and the Magistrate Court were endangered, and there was a possible danger to the structural parts of the Court House building, itself, particularly the upper floor. The condition was such that the only feasible procedure was to completely re-roof the entire building, with new flashing and considerable repairs to the fire walls, including repairs of some large cracks in the upper part of the outer walls of the building. The County Court correctly deemed it an emergency, and entered into a contract with a roofing company for building a new roof and the necessary repairs to the walls, at a total cost of \$4,060.00.

"The County Court, in the 1955 budget, had allocated a small sum, something like \$1,200.00, in Class 5, for repairs to Court House, jail and County buildings. However, this roofing contract considerably exceeds the sum specifically allocated in the budget, itself.

"The County Clerk, as budget officer, has raised the question whether or not, regardless of the order of the County Court so to do, he has authority to write a warrant against unbudgeted surplus funds now in the treasury in payment of the portion of this emergency expense which is not covered by the sum specifically allocated in Class 5; this, in spite of the clear language of Paragraph 6, Section 50,680. I might add that for the past several years the County Court of this County has covered in its budget only the first five classes called for in the budget law. For some reason unknown to me, they have simply ignored Class 6, although for several years the County has annually had an unexpended and unbudgeted surplus."

"I would appreciate an opinion on this question at as early a date as convenient."

The question is then whether the county court can use the unbudgeted revenue of the county to pay part of the expenses of repairing the county courthouse which you have budgeted in Class 5.

Honorable Robert L. Lamar

In order to answer this question it is necessary to answer a subordinate question which is, in what class is this unbudgeted revenue to be classified. There is no provision in the budget law which directly states that unbudgeted revenue is to be classified in any specific class, but Class 6 of Section 50.680, RSMo 1949, states in part:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose; * * *." (Emphasis supplied.)

Thus it would seem that any balance that is unbudgeted surplus, would be an expenditure out of Class 6 and thus would be classified by operation of this statute in Class 6 and the county could expend the same as provided in the budget laws. Since this unbudgeted surplus is part of Class 6, the next question is, can funds from Class 6 be expended for an emergency expense budgeted under Class 5.

In State v. Cribb, 273 S.W. 2d 246, the Missouri Supreme Court En Banc, stated at pages 249 and 250:

"(3-5) It will be noted that the funds assigned to Class 6 may be expended with certain restrictions for 'any lawful purpose'. (Emphasis ours.) One of the restrictions imposed is that 'there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; * * *.' In other words, the funds in Class 6 may not be depleted unless the funds in the other classes are sufficient to pay all claims contracted to be paid out of the funds in such classes. The intention of the Legislature, as evidenced by the provisions supra, established Class 6 somewhat as a guarantee that all claims in the preceding classes shall be paid. It is common knowledge that unforeseen events often occur which require expenditures in excess of the amount assigned to a certain class such as Class 3, the bridge and road fund. If the budget for such class is not sufficient to take care of the unforeseen expense, the county court may use money in Class 6, provided there is a sufficient sum in that class that is not subject to the restrictions mentioned in the statute. It is

Honorable Robert L. Lamar

apparent that that was done in this case when it became evident that Class 3 expenditures might exceed the sum allocated to that class by the budget."

The expense set forth in your request is an unforeseen expense as contemplated by the court in the case cited above and under the law of this case it would seem that funds in Class 6 can be used to pay for an expense budgeted in Class 5 when there is not sufficient funds in Class 5 to pay for such unforeseen expense; provided that there is actually on hand in cash funds sufficient to pay all claims provided for in Classes 1, 2, 3, 4, 5, together with any expense incurred under Class 6, and provided that all outstanding warrants constituting a legal obligation of the county must first be paid.

Although Paragraph 6 of Section 50.710, RSMo 1949, in part, states that the court shall show on the budget estimate the purpose for which any funds as available to this class shall be used it seems that in the light of the Missouri Supreme Court's holding in State vs. Cribb, cited supra, an unforeseen expense such as we have here does not have to be included within the Class 6 budget.

CONCLUSION

It is the opinion of this office that a county court can use unbudgeted revenue, which is part of the Class 6 fund, to pay off an emergency expense budgeted under Class 5 of the budget law if there are not sufficient funds in Class 5 to pay the expense and if there are cash funds on hand sufficient to pay all claims provided for in Classes 1, 2, 3, 4 and 5 together with any expenses already incurred under Class 6 and if all outstanding warrants constituting legal obligations are paid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

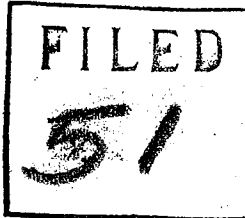
Yours very truly,

John M. Dalton
Attorney General

HLV:vlw

COUNTY COURTS:
COUNTY HIGHWAY EQUIPMENT:
COUNTY SURVEYOR:
COUNTY HIGHWAY ENGINEER:

A county court is authorized to purchase a vehicle as county highway equipment to be used by the county highway engineer exclusively in county business.



October 10, 1955

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"I would like to have your office render an opinion concerning the questions of law which are set out herewith:

"Section 49.110 Mo. RS 1949 states that, 'In all counties of the third class in this state, the judges of the county court shall receive for their services the sum of ten dollars per day for each of the first ten days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they may be necessarily engaged in holding court....'

"1. If one member of the Court were out of the County and the other two members were in regular session transacting business of the County, would the member who was out of the County be entitled to pay for that particular session under the statute quoted above? If one member of the Court were at his home in the County and talked with the other two members who were in session by telephone concerning some problem of County business before the Court at that time, would this member who was at home be entitled to per diem pay for that session of the court?

Honorable Alden S. Lance

"2. Would a County Court in Class 3 County have the authority to purchase a jeep or other form of transportation as part of their highway department equipment for the use of the County Surveyor and Highway Engineer, to be used exclusively in the transaction of business for the County?

"3. In a County of the third class which is attempting to operate on a 'cash basis', do the Constitution and Statutes of the State of Missouri require that the county have enough cash on hand in the treasury to pay all of the budgeted items at the time the budget is approved, or does it merely mean that the actual revenues received during the current year be sufficient to cover all the budgeted expenses for the current year? The purpose of this question is to clear up the matter of what is meant by 'cash basis' in reference to the financial operation of counties of the third class.

"4. This case concerns a problem connected with common school districts. Would the school board of a common school district have the legal authority to pay the parents of resident school pupils who are being transported to high school in an adjacent town district by the parents' private automobile at the same rates that the district is paying for bus transportation provided by the adjacent town district, when the school busses are regularly operating upon routes which extend by the residence of the pupils concerned? These pupils live near the end of the school bus route and they feel that it is more convenient to use their parents' transportation than it is to ride the school bus throughout the regular route.

"An early opinion on the problems set out above will be appreciated."

In answer to your first question I am enclosing two opinions previously rendered by this office, one of which was to the Honorable Herbert H. Douglas, dated December 15, 1939; one to the Honorable G. Logan Marr on February 18, 1947. Although the

Honorable Alden S. Lance

statutes have been changed since 1939 as to the compensation of judges of the county court the language we are interested in is the same. The opinion to Mr. Douglas held that the words "necessarily engaged in holding court" as used in determining whether the judges of the county court shall receive compensation for their services meant that the judge is not entitled to compensation unless he is actually present on the day in question; and the opinion to the Honorable G. Logan Marr held that the judges must be in attendance before they are entitled to compensation. Thus, under these two opinions the judges of the county court are not entitled to compensation unless they are present and attend the court on the day in question.

In answer to your third question I am enclosing an opinion rendered by this office on January 19, 1949, to the Honorable William Lee Dodd, Prosecuting Attorney of Ripley County, Doniphan, Missouri.

In answer to your fourth question I am enclosing an opinion rendered by this office on November 12, 1953, to the Honorable Joseph M. Bone, Prosecuting Attorney of Audrain County, Mexico, Missouri.

The second question is whether the county court in a class three county has the authority to purchase a jeep, or other form of transportation, as part of their highway department equipment for the use of the county highway engineer, to be used exclusively in the transaction of business for the county. Section 49.270, RSMo 1949, states:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Thus, this section authorizes the county court to purchase personal property for the use and benefit of the county.

Honorable Alden S. Lance

We find no statutes prohibiting the county court of a third class county from purchasing such a motor vehicle under statutes having to do with county highway equipment or the county highway engineer. Therefore, this office is of the opinion that if the county court of a third class county, in the exercise of its sound discretion, should decide that the purchase of such vehicle would be beneficial to the county, it would be authorized to purchase such vehicle for the use of the county highway engineer.

CONCLUSION

It is the opinion of this office that a county court of a third class county is authorized to purchase a motor vehicle as county highway equipment to be used by the county highway engineer exclusively for county business.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

Yours very truly,

John M. Dalton
Attorney General

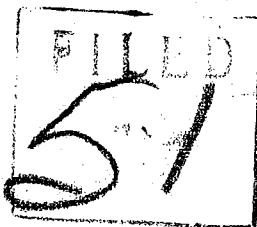
Enclosures - Herbert H. Douglas
12-15-39

G. Logan Marr
2-18-47

William Lee Dodd
1-19-49

HLV:vlw

TAXATION: County clerk in third class county to be paid
COUNTY CLERK: for making supplemental tax book on same basis
FEES: that he is compensated for making tax book.



October 27, 1955

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Mr. Lance:

This is in response to your request for opinion dated
October 5, 1955, which reads as follows:

"I respectfully submit to you a request
for an opinion on the question of law
set out below:

1. In view of the fact that the
Foundation Program and the Cigarette
Tax carried, our County Clerk is con-
fronted with the problem wherein a
six-member board school district has
been operating on a sixty-five cent
levy and are now going to raise the
levy to one dollar, in order that they
may share in the benefits accruing under
the Foundation Program. The County Clerk
has already extended the tax books and
certified them to the County Tax Collector.
My question is this: Will the County Clerk
in a third class county such as Andrew
County be required to receive the tax books
back from the Collector and correct his
extensions to show the additional thirty-
five cent levy for the one school district
involved, or will he be required by law to
submit a supplemental listing to show the
additional thirty-five cent levy? Will the
County Clerk be entitled to pay for the
additional work required and, if so, in
what amount?

"According to your statement issued to
the papers at an earlier date this year,

Honorable Alden S. Lance

the County Clerk is not required to have his extensions made and the books turned over to the Collector until the 21st day of October. Would he be required to make the corrections or supply the supplemental listing by October 21?"

We are enclosing herewith a copy of each of the following opinions which we believe contain the answers to your first and last questions:

Homer F. Williams, July 16, 1953;
Donald P. Thomasson, October 7, 1953;
Edwin F. Brady, January 11, 1954.

With regard to your second question concerning the payment due the county clerk for making the supplemental tax book, we are enclosing copy of an opinion of this office directed to W. H. Holmes under date of November 23, 1949, which sets forth the basis of payment to the county clerk for making the tax book. Also enclosed is a copy of an opinion directed to Philip A. Grimes under date of March 14, 1951.

We further direct your attention to that portion of Section 137.300, RSMo 1949, which reads as follows:

" * * * In making said supplemental tax book, and in all subsequent proceedings thereon, the county court, clerk of the same and the collector shall be governed by the same law as is now or at the time then being or may be in force for the same duties, and shall receive the same compensation as is now or at the time then being or may be provided by law for similar duties; * * *"

From that, we believe it clear that the county clerk in a county of the third class is to be paid for making the supplemental tax book on the same basis that he is compensated for making the tax book.

CONCLUSION

It is the opinion of this office that the county clerk in a county of the third class is to be paid for making a

Honorable Alden S. Lance

supplemental tax book on the same basis that he is compensated for making the tax book.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

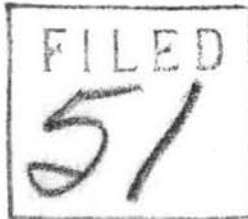
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (5)

DEATHS:
INQUESTS:
CORONERS:

There is no legal obligation imposed upon anyone finding and disposing of a dead body to notify the coroner within whose jurisdiction such body was found, other than the local registrar of vital statistics, and only by him when the death was caused by other than natural causes.



December 1, 1955

*See sec 58.451 applicable to
St Louis City, First and Second
Class counties.*

Mr. Robert Lamar
Prosecuting Attorney
Texas County
Cabool, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Mr. Gentry, Coroner of Texas County, has asked me a question which at first I thought was simple, but on which I am unable to find any Statutory enactment. In an automobile accident late at night, a man driving alone in his car was killed. When the accident was discovered, a doctor and ambulance were called, but the man was dead before their arrival. The incident was not reported to the Coroner until some days later, after the body had been embalmed and buried. He has asked me if there is any requirement that persons finding a dead body report the same to the Coroner's office. It seems likely that at some time there has been an opinion on this question from your office, and if so, I would very much appreciate having a copy of it."

All references to statutes are to RSMo 1949.

The question which you directly ask us is: "If there is any requirement that persons finding a dead body report the same to the coroner's office?"

However, the fact situation which you set forth as giving rise to your question presents the additional question of whether persons finding a dead body and disposing of it, are required to report this fact to the coroner. We shall consider these questions in the above order.

It would clearly appear that there is no requirement to report in the first situation. If John Doe is walking through a woods and comes upon a dead human body, he may legally walk away and not report the fact to anybody. Or, he may report it to some

Mr. Robert Lamar

people and not to others, but he is under no obligation to report it to the coroner.

In this regard, we direct attention to the (1948) case of State v. Stringer, 211 S.W.2d 925. In this case it was established that a young, unmarried woman gave birth to a baby; that within some two hours after its birth, she dropped it on the floor, as a result of which the baby died. She claimed that the dropping was accidental; the state maintained that the dropping was intentional. It was further established that immediately after the baby died, the mother took the body out to a weed patch back of her home and secreted it. When first questioned by officers, she stated that she had given the baby to some people in St. Louis. Later, when the body of the baby was found, she changed her story as above. She was duly tried and convicted of manslaughter, and appealed.

In its opinion reversing the judgment, the Missouri Supreme Court stated, in part (l.c. 930-31):

"This brings us to the problem of whether certain evidence was admissible and if not whether its admission prevented a fair trial and was therefore unjustly prejudicial to the rights of the accused. The facts and circumstances noted were established by the testimony of two neighbors and the little girl, by the doctor and his daughter and by the sheriff and the prosecuting attorney. In addition to these witnesses the state produced the Coroner of Washington County, Dr. Dempsey. When he was first offered as a witness defense counsel inquired as to the purpose of his testimony and the prosecutor said: 'The purpose of the inquiry is to show there was never any report made by the defendant to the Coroner of the county, Washington County, Missouri, of the death of this baby.' When defense counsel objected to this offer the court expressed the opinion that the state could show that the witness was the Coroner and then inquire whether any one had reported the death to him. This question was then asked: 'Has anyone made a report to you since August 15, 1946, on August 15 or since that time, with regard to the death of a male child that was born to Jerene Stringer?' The answer was 'No, I did not receive any official notice.'

"The state contends in any event that the evidence could not have been prejudicial to the accused and

was therefore harmless error. It is contended that no jury would be influenced against the accused merely because the coroner said that no one had reported the death in question to him. In this connection it is argued that the jury could not have considered the failure of the defendant to report the death to the coroner as of any consequence because they would be unaware of the duty to report a death to the coroner.

"(13) However, from the prosecuting attorney's initial statement and from the context it is plain that the purpose of the testimony was to show that the accused had not reported the child's death to the coroner. He was finally permitted to say that no one had officially reported the death to him, but of what consequence could that fact have been unless it meant that the appellant had not reported it? In the second place, the argument erroneously assumes that there was some legal duty on the general public and particularly upon the accused to report the child's death to the coroner. An examination of the statutes does not reveal any such general public duty. Mo.R.S.A. Sections 9767, 13227-13268, 14839. The Statute requiring the coroner to summon a jury 'so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty,' (Mo.R.S.A. Section 13231) does not necessarily impose any such specific duty upon an accused or, for that matter, upon the general public.

193.1410

52.180-

58.510

293.400

"(14) But irrespective of any duty on the part of the general public it is certain that there was no statutory duty on the accused to report the child's death to the coroner and the meritorious question is whether the plain inference that there was such a duty was unfairly prejudicial in the circumstances of this trial. As we have pointed out, the evidence to show that the appellant intentionally killed the child was wholly circumstantial. There was the fact of no preparation for the baby's birth, her desire to conceal its birth and its identity and finally her concealment of its body. 26 Am. Jur., Secs. 302, 475. Any circumstance, including the desire to elude discovery, reasonably pointing to the

defendant's guilt was admissible against her. 1 Wharton, Criminal Evidence, Sec. 299, p. 395. But here her failure to report the child's death to the coroner is not necessarily inconsistent with her innocence. In some instances failure to report a death might be a most cogent circumstance pointing to guilt. For example, in Hedger v. State, 144, Wis. 279, 128 N.W. 80, a husband knew that his wife lay dead in the kitchen of their home, a victim of violence, and yet he failed to report the fact to any one and so contrived that some one else should apparently be the first to discover her. In this case it is obvious that the appellant did not intend to report the child's death at all--on the contrary, she attempted to conceal it--and the fact that she did not report it to any one or to some person who in the normal course of events she would naturally have been expected to report it to is a strong indication of guilt. The fact of this plain inference demonstrates the damaging quality of the coroner's evidence that she had not reported the child's death to him.

"(15) She was under no statutory duty to do so and there was no compulsion, in the circumstances, for her reporting it to the coroner. Had he talked to her in his official capacity as the sheriff and the prosecuting attorney did, or even as a friend, there might then have been some reason for her divulging the child's death. But here there was no duty or circumstance compelling a voluntary report by the accused to the coroner in any capacity. * * *"

The above case, which has not subsequently been modified by a later appellate court opinion, more than sustains our position above.

We now turn our attention to the second situation set forth by you. In this regard we direct attention to Section 193.130, which reads as follows:

"A certificate of every death or still-birth shall be filed with the local registrar of the district in which the death or stillbirth occurred within three days after the occurrence is known; or if the place of death or stillbirth is not known

Mr. Robert Lamar

then with the local registrar of the district in which the body is found within twenty-four hours thereafter. In every instance a certificate shall be filed prior to interment or other disposition of the body."

Also, to Section 193.140, which reads:

"1. The person in charge of interment shall file with the local registrar of the district in which the death or stillbirth occurred or the body was found a certificate of death or stillbirth within three days after the occurrence.

"2. In preparing a certificate of death or stillbirth the person in charge of interment shall obtain and enter on the certificate the personal data required by the division from the persons best qualified to supply them. He shall present the certificate of death to the physician last in attendance upon the deceased or to the coroner having jurisdiction who shall thereupon certify the cause of death according to his best knowledge and belief. He shall present the certificate of stillbirth to the physician, midwife, or other person in attendance at the stillbirth, who shall certify the stillbirth and such medical data pertaining thereto as he can furnish.

"3. Thereupon the person in charge of interment shall notify the appropriate local registrar, if the death occurred without medical attendance, or the physician last in attendance fails to sign the death certificate. In such event the local registrar shall inform the local health officer and refer the case to him for immediate investigation and certification of the cause of death prior to issuing a permit for burial, cremation or other disposition of the body. When the local health officer is not a physician or when there is no such officer, the local registrar may complete the certificate on the basis of information received from relatives of the deceased or others having knowledge of the facts. If the circumstances suggest that the death or stillbirth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification."

From the above, it is clear that in the situation which you set forth, the undertaker, who prepared the body for burial and who

Mr. Robert Lamar

did bury it, was required to file with the local registrar of vital statistics, prior to "interment or other disposition of the body," a certificate of death and receive from him "a permit for burial, cremation, or other disposition of the body."

On October 10, 1941, this department rendered an opinion, a copy of which is enclosed, to Frank W. Jenny, Prosecuting Attorney of Franklin County, which opinion elaborates upon this point.

Paragraph 3 of Section 193.140, supra, concludes with the statement that "if the circumstances suggest that the death or still-birth was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification."

This clearly leaves the matter of referring the case to the coroner to the discretion of the registrar, and also relieves all other persons from any such duty. In the (1941) case of Crenshaw v. O'Connell, 150 S.W.2d 489, at l.c. 492, the court stated:

"As to this, suffice it to say that under the statute having to do with the coroner's duties in respect to registration of deaths, Sec. 9767, 193.140 R.S.No 1939, Mo. St. Ann Section 9047, p. 4191, the coroner is authorized to make a certificate of death only when the case is referred to him by the local registrar as one without an attending physician and one where the circumstances of the case render it probable that the death was caused by unlawful or suspicious means. The purpose of such reference is, of course, to have an investigation by the coroner as the officer whose duty it is to hold an inquest on the body of any deceased person; and when such a case is properly referred to the coroner, he conducts his investigation, and then executes the certificate of death required for a burial permit, stating therein the disease causing death or the means of death, and otherwise making the same conform to the requirements of the statute. O'Donnell v. Wells, 323 Mo. 1170, 21 S.W.2d 762; Patrick v. Employers Mutual Liability Insurance Co., supra; Gilpin v. Aetna Life Insurance Co., 234 Mo. App. 566, 132 S.W.2d 686."

We shall not here go into the statutes and cases regarding coroners and their duties other than to observe that all of them pertain to the duty of the coroner when he shall have been notified of the existence of a dead body. None of these laws and cases refer to any duty imposed upon anyone to so notify the coroner other than the laws and cases heretofore cited by us and cases not cited by us but of similar import with those cited.

Mr. Robert Lamar

In view of the above, we feel that in the situation which you set forth, that the undertaker who took charge of the body, prepared it for burial and did bury it, was not under any duty to notify the coroner of this death. We have noted that it was the duty of the undertaker to prepare and present to the local registrar of vital statistics a certificate of death and to receive from him a permit for burial, cremation or other disposition of the body.

CONCLUSION

It is the opinion of this department that there is no legal obligation imposed upon anyone finding and disposing of a dead body to notify the coroner within whose jurisdiction such body was found, other than the local registrar of vital statistics, and only by him when the death was caused by other than natural causes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

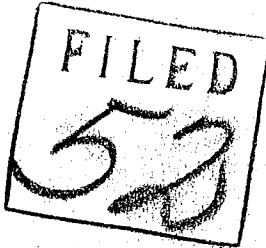
Very truly yours,

John M. Dalton
Attorney General

HPW/bl/ld

enc. Frank W. Jenny,
 Oct. 10, 1941

INSURANCE: Amendment of Articles of Incorporation of American Automobile Insurance Company.



March 3, 1955

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter transmitting a certified copy of the proceedings of directors and stockholders of American Automobile Insurance Company had on February 10, 1955, and March 3, 1955, respectively, whereby such insurance company amended its Articles of Incorporation so as to increase its capital stock from Three Million Dollars (\$3,000,000.00) divided into One Million Five Hundred Thousand (1,500,000) shares of the par value of Two Dollars (\$2.00) each, to Three Million Five Hundred Thousand Dollars (\$3,500,000.00) divided into One Million Seven Hundred And Fifty Thousand (1,750,000) shares of the par value of Two Dollars (\$2.00) each.

An examination of the certified proceedings referred to in the preceding paragraph discloses that the same are in accordance with the provisions of Section 379.010 to 379.200 RSMo 1949, and not inconsistent with the Constitution and laws of the State of Missouri and the United States.

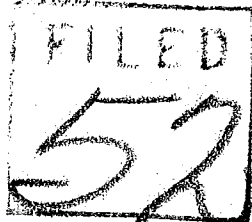
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

John H. Dalton
Attorney General

JLO'M:vlw

INSURANCE: Income on contracts of Old Reliable Atlas Life
TAXATION: Society, a stipulated premium plan company,
assumed under reinsurance contract by Old
American Insurance Company, but not reissued,
is not subject to premium tax provided in
Section 148.370 RSMo 1949 (Cumulative Supplement,
1953.)



May 4, 1955

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This opinion is rendered in reply to your request reading as follows:

"The Old American Insurance Company, a regular life insurance company of Missouri, reinsured effective November 1, 1954, all of the business of the Old Reliable Atlas Life Society of Springfield, Missouri, a stipulated premium plan life insurance company.

"The contract of reinsurance is enclosed herewith for your information, together with a copy of the Assumption Certificate issued by the Old American Insurance Company.

"I respectfully request your official opinion as to the liability of the Old American Insurance Company for the payment of premium taxes under Section 148.320, Revised Statutes of Missouri 1949, on the money received by it on account of the business of the Old Reliable Atlas Life Society assumed under said Contract of Reinsurance and Assumption Certificate."

Honorable C. Lawrence Leggett

Supplementing your original request, quoted above, you informed this office that "Section 148.320" shown in the third paragraph of such request should read Section 148.370 RSMo 1949.

The contract of reinsurance between Old American Insurance Company and Old Reliable Atlas Life Society discloses that the latter company was organized in Missouri and operated as a stipulated premium plan company under the provisions of Sections 377.200 to 377.460 RSMo 1949, at the time the contract of reinsurance was entered into. As recently as August 30, 1954, this office ruled that stipulated premium plan companies organized in Missouri under the provisions of Sections 377.200 to 377.460 RSMo 1949 are not subject to the premium tax provided for in Section 148.370 RSMo 1949. The question to be resolved in this opinion is whether the contract of reinsurance, coupled with the assumption certificates issued, cause the income on such contracts assumed by the Old American Insurance Company, a regular life company, to be subject to the premium tax statute, Section 148.370 RSMo 1949 (Cumulative Supplement, 1953) which statute provides:

"Every insurance company or association organized under the laws of the state of Missouri and doing business under the provisions of sections 376.010 to 376.670, 379.205 to 379.310 and chapter 381, RSMo, and every mutual fire insurance company organized under the provisions of sections 379.010 to 379.190 RSMo, shall, as hereinafter provided, annually pay, beginning with the year 1945, a tax upon the direct premiums received by it from policyholders in this state, whether in cash or in notes, or on account of business done in this state, for insurance of life, property or interest in this state, at the rate of two per cent per annum, which amount of taxes shall be assessed and collected as hereinafter provided; provided, that fire and casualty insurance companies or associations shall be credited with canceled or returned premiums actually paid during the year in this state, and that life insurance companies shall be credited with dividends

Honorable C. Lawrence Leggett

actually declared to policyholders in this state but held by the company and applied to the reduction of premiums payable by the policyholder."

Article VIII of the contract of reinsurance states in plain language what Old American Insurance Company proposes to do in relation to the reinsured risks, and we quote such article as follows:

"OLD AMERICAN shall grant an assumption of risk rider on each reinsured risk. Such rider shall be delivered to the policyholder or mailed, postage prepaid, to his address as shown on the SOCIETY'S records, and shall, among other things, recite that the premium rate on his or her contract of insurance has not and will not be increased over the premium rate therefor in force as of the risk assumption time."

The assumption certificate issued by the Old American Company to each policyholder reinsured contains the essential provisions found in Article VIII of the contract of reinsurance quoted above.

Under the provisions of Section 377.260 RSMo 1949, an insurance company organized on the stipulated premium plan is required to set aside an emergency fund to guarantee policy obligations, and subparagraph 2 of such statute provides:

"2. If by any reason of excessive mortality, or other cause, the emergency fund as thus constituted shall become exhausted, then the superintendent of insurance shall require the officers of such corporation, company or association to notify all policyholders on or before the first of the next succeeding month to pay, within thirty days from the mailing of such notice, an extra premium, sufficient to meet the amount of the maximum policy issued apportioned equitably."

Section 148.370 RSMo 1949 (Cumulative Supplement, 1953) is Missouri's premium tax statute directed to domestic insurance

Honorable C. Lawrence Leggett

companies. Such statute has its counterpart in Section 148.340 RSMo 1949, a statute imposing a premium tax on foreign insurance companies doing business in Missouri. No appreciable difference exists between the two statutes as they are both directed to "direct premiums received" by the companies. Insofar as the latter statute, Section 148.340 RSMo 1949, is to be applied to "premiums received" by a foreign insurance company doing business in Missouri, as distinguished from "assessments," the Supreme Court of Missouri in the case of Bankers' Life Co. v. Chorn, 186 S. W. 681, 1.c. 684, spoke as follows:

"* * Having in mind this intrinsic distinction between the purpose and object of the section under review (R. S. 1909, Sec. 7099) this court, in banc, in the decision referred to, decided that the Legislature, in imposing this duty of 2 per cent, upon the 'premiums' received by foreign insurance companies, merely exercised its power 'to impose a license or occupation tax on insurance companies'; and hence the enactment for that purpose became properly part and parcel of the special code provided by our law for regulating the business of foreign and domestic insurance, and that the terms of the act disclosed, however, that it was only applicable to companies insuring for fixed or level premiums, and not to those doing business on the assessment plan. * * *" (Underscoring supplied.)

In construing Section 148.340 RSMo 1949, the Supreme Court of Missouri in Young v. Life Insurance Company, 277 Mo. 694, 1.c. 699, spoke as follows:

"No such tax was demandable, under the statutes and decisions of this State, by any company doing business on the assessment plan."

We adopt the rulings of the Supreme Court in the two cases cited above, and hold that such rulings are to be applied to Section 148.370 RSMo 1949 (Cumulative Supplement, 1953) because of the similarity of the two taxing statutes, in being addressed to "direct premiums received."

Honorable C. Lawrence Leggett

The only question remaining is whether the provision for additional assessments on policyholders in a stipulated premium plan company, as set forth in subparagraph 2 of Section 377.260 RSMo 1949, heretofore quoted, will cause contracts of such a company to be on the "assessment plan" and not to be within the premium tax statute. In *Moran v. Franklin Life Insurance Company*, 160 Mo. App. 407, 1.c. 421, we find the following statement:

"It is sufficient for the purposes of this suit that we may deduce from such decisions the conclusion that even though a policy contains provision for fixed and defined sums to be paid at certain intervals, still if such payments do not form the only resource for the payment of the benefit and are not necessarily sufficient for that purpose, but by the terms of the contract shall be supplemented, if necessary, by an assessment which shall be levied by some designated person or body, and be directed against and binding upon persons holding similar contracts, then such policy meets the requirement of the statute under consideration. * * * It is not necessary for us to decide that a policy may not be an assessment contract unless it meets every requirement above mentioned; but we do hold that if it does meet all such requirements it is certainly an assessment contract.***"

CONCLUSION

It is the opinion of this office that the premium tax to be levied on domestic insurance companies under Section 148.370 RSMo 1949 (Cumulative Supplement, 1953), is not to be directed to the income on contracts of Old Reliable Atlas Life Society, a stipulated premium plan company, which have been assumed and taken over, but not reissued, by Old American Insurance Company, a regular life company, pursuant to a contract of reinsurance entered into under authority contained in Section 376.520 RSMo 1949.

Honorable C. Lawrence Leggett

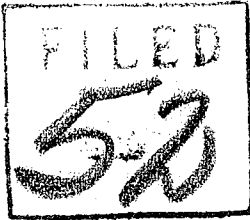
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JEO'M:vlw

INSURANCE: Articles of Incorporation of Missouri Union Casualty Co.



June 27, 1955

Honorable G. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of June 24, 1955, an examination has been made of an executed copy of the original Articles of Incorporation, together with proof of publication of the same, to form an insurance company to be known as Missouri Union Casualty Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1949, and not inconsistent with the Constitution and laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO'M:gm

INSURANCE: Articles of Incorporation of Financial Reserve
Life Insurance Company of America.

July 27, 1955



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of July 26 with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Financial Reserve Life Insurance Company of America, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

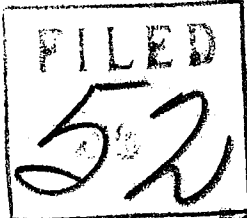
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Very truly yours,

JOHN M. DALTON
Attorney General

JLO'M:gm

INSURANCE: Articles of Agreement of American Universal
Life Insurance Company.



August 3, 1955

Honorable G. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your requests of July 19 and July 29, 1955, an examination has been made of an executed copy of Articles of Agreement of the proposed American Universal Life Insurance Company.

It is the opinion of this office that the Articles of Agreement heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, RSMo 1949, and the same are hereby approved under the directive contained in Section 377.220, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN H. DALTON
Attorney General

JLO:Mig

INSURANCE: Articles of Incorporation of Missouri-Western
Fire and Marine Insurance Company.

August 31, 1955



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of August 30, 1955, an examination has been made of an executed copy of the original Articles of Incorporation, together with proof of publication of the same, to form an insurance company to be known as Missouri-Western Fire and Marine Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1949, and not inconsistent with the Constitution and laws of this State and of the United States.

The foregoing opinion which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

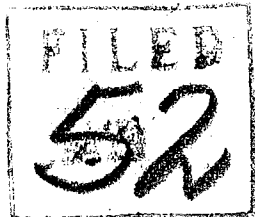
Yours very truly,

JOHN M. DALTON
Attorney General

JLD:Hgm

INSURANCE:

Articles of Incorporation of Holland-America
Insurance Company.



September 21, 1955

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of September 14, 1955, an examination has been made of an executed copy of Declaration of Corporators, including original Articles of Incorporation, to form an insurance company under the provisions of Chapter 379 RSMo 1949, to be known as Holland-America Insurance Company, together with proof of publication of such Declaration of Corporators as required by law.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160 RSMo 1949, and not inconsistent with the Constitution and laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

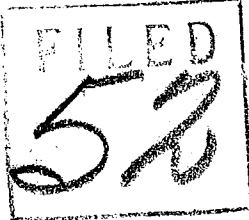
Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

INSURANCE: Articles of Incorporation of The Union Insurance Corporation of America.

November 7, 1955



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of November 4, 1955, an examination has been made of an executed copy of Declaration of Corporators, including original Articles of Incorporation, to form an insurance company under the provisions of Chapter 379 RSMo 1949, to be known as The Union Insurance Corporation of America, together with proof of publication of such Declaration of Corporators as required by law.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160 RSMo 1949, and not inconsistent with the Constitution and laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

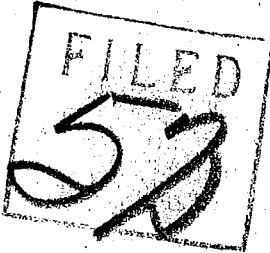
Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

INSURANCE: Articles of Incorporation of The Cardinal Life Insurance Company.

November 29⁹, 1955



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of November 22nd with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed The Cardinal Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1949. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1949, and not inconsistent with the constitution and laws of this state and the United States.

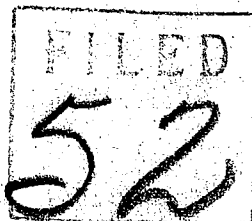
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Julian L. O'Malley.

Very truly yours,

John M. Dalton
Attorney General

JLO'M:vlw

INSURANCE: Amended Articles of Incorporation of Capital Reserve Life Insurance Company.



December 12, 1955

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

This formal opinion is rendered in reply to your inquiry of December 7, 1955, which was accompanied by an executed copy of amended Articles of Incorporation of Capital Reserve Life Insurance Company, together with official certificates of company officers attesting to the action of the board of directors of such company, by which actions the Capital Reserve Life Insurance Company, a stipulated premium plan life insurance company operating under Chapter 377 RSMo 1949, has by a majority vote of its directors or trustees elected to accept the provisions of Missouri's regular life law found at Sections 376.010 to 376.670 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949. While the amended Articles of Incorporation may be said to be technically deficient wherein they fail to state that the corporation is not to exercise its newly acquired powers until its stated capital is fully paid up, this deficiency may be supplied by having the directing officers of such company properly certifying, to your satisfaction, that the increased capital is fully subscribed and paid into the corporation before a license is issued to the company to conduct its business under its new powers. This apparent oversight should not make it necessary to further amend the Articles of Incorporation.

Conditioned as above, it is the opinion of this office that the documents heretofore referred to are legally sufficient as to form, are in accord with the provisions of Chapter 376 RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

INSURANCE: Articles of Incorporation of Colonial Casualty
Company of America.

December 21, 1955



Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of December 19, 1955, an examination has been made of an executed copy of Declaration of Corporators, including original Articles of Incorporation, to form an insurance company under the provisions of Chapter 379 RSMo 1949, to be known as Colonial Casualty Company of America, together with proof of publication of such Declaration of Corporators as required by law.

It is the opinion of this office that documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160 RSMo 1949, and not inconsistent with the Constitution and laws of this State and of the United States.

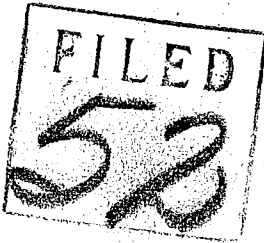
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

INSURANCE: Amended Articles of Incorporation of Security
National Life Insurance Company.



December 21, 1955

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

Receipt is acknowledged of your letter of December 20, 1955, with which you submitted to this office official certificates of company officers attesting to the action of the board of directors by which actions the Security National Life Insurance Company, a stipulated premium plan life insurance company operating under Chapter 377 RSMo 1949, has by a majority vote of its directors or trustees elected to accept the provisions of Missouri's regular life law found at Sections 376.010 to 376.670 RSMo 1949.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1949. While the amended Articles of Incorporation may be said to be technically deficient wherein they fail to state that the capital stock is to be subscribed and fully paid up, such deficiency is considered remedied by the statement contained in your letter of transmittal disclosing that the records in your office show that the full amount of capital stock authorized has been subscribed and fully paid in.

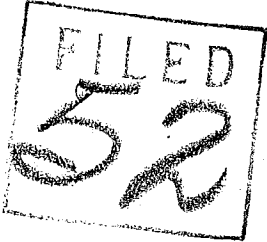
It is the opinion of this office that the documents referred to above are legally sufficient as to form, are in accord with the provisions of Chapter 376 RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

INSURANCE: Stipulated premium plan life insurance companies subject to Secs. 375.330 and 376.300 RSMo 1949. Restrictive provisions in Sec. 375.330 touching purchase of realty do not apply to acquisition by gift without valuable consideration, but do apply to subsequent holding and conveying of such real estate. Common capital stock of holding company may be acquired by gift without valuable consideration by stipulated premium plan life insurance company, but subsequent holding of such stock violates Sec. 376.300 RSMo 1949. Method of valuation of real estate acquired by stipulated premium plan life insurance company by gift is not prescribed by statute, and must be left to discretion of Superintendent of the Division of Insurance and company officers.



December 30, 1955

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This opinion is being rendered in reply to your request reading as follows:

"The National Bellas Hess Life Insurance Company is a stipulated premium plan life insurance company, organized and doing business under Chapter 377, Revised Statutes of Missouri 1949. It has a capital of \$25,000 and is wholly owned by National Bellas Hess, Inc., a general business corporation located in North Kansas City, Missouri.

"On April 1, 1955, the parent corporation transferred certain real estate and common stock to the life insurance company. The common stock referred to is stock in holding corporations, the sole assets of each such corporation being real estate. For a more complete description of the properties and common stock, please refer to Schedule A, attached to the Memorandum of the captioned company, which is enclosed herewith. It will be noted that one parcel of real estate is being occupied by the life insurance company as home office property. The acquisition of this property was without prior approval of the Superintendent of Insurance.

Honorable C. Lawrence Leggett

"I respectfully request your official opinion as to whether or not Sections 375.330 and 376.300, respectively, Revised Statutes of Missouri 1949, have any application to the acquisition by gift and the subsequent retention of the real estate and common stock by the National Bellas Hess Life Insurance Company, and, further, if such sections do apply, what is their effect on such acquisition and retention.

"In the event this insurance company is permitted under the statutes to hold this real estate, I would appreciate your further opinion as to the method of valuation thereof; whether it should be carried at equity value, market value, or, in the case of the home office property, at an arbitrary book value not to exceed the amount of its capital stock.

"I am enclosing a Memorandum from this company on this question and would appreciate its return when you are finished with it."

It stands conceded that the insurance company with which this opinion deals is a stipulated premium plan life insurance company formed under Chapter 377 RSMo 1949. Since the company was organized in January, 1954, its capital stock has become wholly owned by National Bellas Hess, Incorporated, a general business corporation. On or about April 1, 1955, the general business corporation caused to be transferred to the insurance company certain assets, referred to as "a donation to surplus, i.e., as a gift", described as follows:

"Parcel A: 715 Armour Road (land and building) to which fee title is now held; Life Co. is housed there."

"Parcel B: Armour Road vacant land adjoining (and originally part of) Parcel A; fee title is now held; under contract of sale."

"Parcel C: 14th and Swift (Beverly property) - land and building - fee title to which is now held; income producing."

"Item D: 16th and Swift (Martina property)

Honorable C. Lawrence Leggett

where 100% of the common capital stock (the only class of stock) of Martina Holding Corporation is owned, Martina in turn owning the fee title to land and building; adjoins the Beverly property."

Sections 375.330 and 376.300 RSMo 1949, referred to in the third paragraph of the opinion request, are not to be found in the statutes particularly applicable to the organization and operation of a stipulated premium plan life insurance company, and our first question to be decided is the applicability of such statutes to a stipulated premium plan life insurance company.

We first discuss Section 375.330 RSMo 1949. The statute must be read in its entirety to fully appreciate its scope and purpose. It reads as follows:

"1. No insurance company formed under the laws of this state shall be permitted to purchase, hold or convey real estate, excepting for the purpose and in the manner herein set forth, to wit:

"(1) Such as shall be necessary for its accommodation in the transaction of its business; provided, that before the purchase of real estate for any such purpose, the approval of the superintendent of the division of insurance must be first had and obtained and in no event shall the value of such real estate, together with all appurtenances thereto, purchased for such purpose

"(a) If a stock company, exceed the amount of its capital stock;

"(b) If a fire or casualty company, but not a stock company, exceed sixty per cent of its surplus or ten per cent of its admitted assets, as shown by its last annual statement preceding the date of acquisition, as filed with the superintendent of the division of insurance, whichever is the lesser; or

Honorable C. Lawrence Leggett

"(c) If any other type or kind of insurance company, exceed sixty per cent of its surplus or five per cent of its admitted assets, as shown by its last annual statement, which ever is the lesser; and provided further, that

"(d) Any insurance company formed under the laws of this state, except a stock company, may with the approval of the superintendent of the division of insurance purchase such real estate as shall be necessary for its accommodation in the transaction of its business and having a value in excess of the foregoing limitations but not in excess of one hundred thousand dollars; or,

"(2) Such as shall have been mortgaged in good faith by way of security for loans previously contracted, or for moneys due; or,

"(3) Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or,

"(4) Such as shall have been purchased at sales upon the judgments, decrees or mortgages obtained or made for such debts; or,

"(5) Such as shall be necessary and proper for carrying on its legitimate business under the provisions of the Urban Redevelopment Corporations Act; or,

"(6) Such as shall have been acquired under the provisions of the Urban Redevelopment Corporations Act permitting such company to purchase, own, hold or convey real estate; or,

"(7) Such real estate, or any interest therein, as may be acquired or held by it by purchase, lease or otherwise, as an investment for the production of income,

Honorable C. Lawrence Leggett

which real estate or interest therein may thereafter be held, improved, developed, maintained, managed, leased, sold or conveyed by it as real estate necessary and proper for carrying on its legitimate business.

"2. Provided, that investments hereunder shall only be in new business or new industrial properties or for new residential properties or new housing purposes, the approval of the superintendent of the division of insurance first having been obtained.

"3. Provided, no such insurance company shall invest more than five per cent of its admitted assets, as shown by its last annual statement preceding the date of acquisition, as filed with the superintendent of the division of insurance of the state of Missouri, in the total amount of real estate acquired under subdivision (7) of subsection 1 of this section.

"4. And it shall not be lawful for any company incorporated as aforesaid to purchase, hold or convey real estate in any other case or for any other purpose; and all such real estate acquired in payment of a debt, by foreclosure or otherwise, and real estate exchanged therefor, shall be sold and disposed of within ten years after such company shall have acquired absolute title to the same, unless the company owning such real estate or interest therein shall elect to hold it pursuant to subdivision (7) of subsection 1 of this section.

"5. The superintendent of the division of insurance, may for good cause shown, extend the time for holding such real estate acquired in payment of a debt, by foreclosure or otherwise, and real estate exchanged therefor, and not held by the company under subdivision (7) of subsection 1 above, for such period as he may find to be to the best interest of the policyholders of said company."

Honorable C. Lawrence Leggett

The statute just quoted above treats exclusively the subject of purchasing, holding or conveying real estate. It is a statute which prohibits, and is directed to any insurance company formed under the laws of Missouri, and is contained in Chapter 375 RSMo 1949 entitled "provisions applicable to all insurance companies." Of utmost importance to this question is the language contained in Section 377.200 RSMo 1949, the first statute found in Missouri's stipulated premium plan life insurance company law (Secs. 377.200-377.460 RSMo 1949), and we quote the statute in its entirety:

"Any corporation, company or association issuing policies or certificates promising money or other benefits to a member or policyholder, or upon his decease, to his legal representatives, or to beneficiaries designated by him, which money or benefit is derived from stipulated premiums collected in advance from its members or policyholders, and from interest and other accumulations and wherein the money or other benefits so realized is applied to or accumulated solely for the use and purposes of the corporation as herein specified, and for the necessary expenses of the corporation, and the prosecution and enlargement of its business, and which shall comply with all the provisions of sections 377.200 to 377.460, shall be deemed to be engaged in the business of life insurance upon the stipulated premium plan and shall be subject only to the provisions of sections 377.200 to 377.460, except that the provisions of sections 374.090 to 374.110, 374.140, 374.190, 374.210 to 374.230, and 375.420, RSMo 1949, shall be applicable. It shall be unlawful for any corporation, company or association not having complied with the provisions of sections 377.200 to 377.460 to use the term 'stipulated premium' in its application or contracts, or to print or write the same in its policies or literature."

The statute just quoted, above, was construed by the Supreme Court of Missouri as late as March 8, 1954, in the case of Old Reliable Atlas Life Society v. Leggett, 265 S.W. (2d) 302. We cite and quote from this recent case for the reason that in such case Section 377.200 RSMo 1949 was reviewed

Honorable C. Lawrence Leggett

in the light of its possible limitation on the applicability of certain statutes found in Chapters 374 and 375 of Missouri's Insurance Code. The plaintiff in the action was a Missouri life insurance company formed under Missouri's stipulated premium plan life insurance company law, Sections 377.200 - 377.460 RSMo 1949. In the Old Reliable case, cited supra, the main contention of the plaintiff-appellant is clearly stated in the following language found at 265 S.W. (2d) 302, 1.c. 311:

"Appellant argues that in every instance where the courts have been called upon to interpret the meaning of Sec. 377.200 which defines the powers and duties of stipulated premium plan life insurance companies, they have held such companies not subject to any statutory provisions other than those set out in that section."

A reading of Section 377.200 RSMo 1949 discloses that Section 375.330 RSMo 1949 is not referred to in the former statute. In holding that Chapters 374 and 375 RSMo 1949, are applicable to insurance companies formed on the stipulated premium plan life insurance law (Secs. 377.200 - 377.460 RSMo 1949), the Court spoke as follows at 265 S.W. (2d) 302, 1.c. 312:

"But notwithstanding these three decisions on collateral matters paragraph J-2 of the trial court's decree in this case held that the provisions of Secs. 377.200-460, RSMo 1949, V.A.M.S., dealing with stipulated premium plan life insurance, are not a code within themselves insofar as the powers and duties of the Superintendent are concerned. On the contrary the decree held the super-visory powers and duties of the Superintendent include those provided for in Chapter 375, RSMo 1949, V.A.M.S., applicable to all insurance companies, in particular Sec. 375.560 providing for the winding up of insurance companies, and Sec. 375.640 authorizing the Superintendent to take charge of them. And it further declared it was the legislative intent to give the Superintendent the same regulatory powers

Honorable C. Lawrence Leggett

over the plaintiff-appellant Old Reliable Society and other companies operating on the stipulated premium plan that he possesses with respect to insurance companies operating on other plans."

From the opinion in the Old Reliable case, cited supra, we conclude that in those instances where statutes are to be found in Chapters 374 and 375 RSMo 1949, dealing with supervisory and regulatory powers of the Superintendent of the Division of Insurance, as distinguished from those having relation to (a) the charter power of the company to contract with its policyholders or (b) to a prohibition against a company's invasion of fields of insurance other than life insurance on the stipulated premium plan, such statutes are to be held applicable to companies formed under the stipulated premium plan life company law (Secs. 377.200 - 377.460 RSMo 1949), unless statutes in such special law specifically refer to statutes of the general law from which stipulated premium plan life companies are to be exempt.

In Section 375.330 RSMo 1949, do we have a statute disclosing supervisory or regulatory power of the Superintendent of the Division of Insurance? When we consider the statute's general prohibition against purchasing, holding or conveying real estate, followed as it is by a directive that before any purchase is made the approval of the Superintendent of the Division of Insurance is required, and also followed by stated rules to be applied in qualifying such purchases, we deem the statute to clothe the Superintendent with both supervisory and regulatory power, and it is concluded that Section 375.330 RSMo 1949 is applicable to a stipulated premium plan life insurance company.

The opinion request next brings into question the applicability of Section 376.300 RSMo 1949, as amended (Laws 1953, p. 235, and H.B. No. 231, 68th General Assembly, 1955), to the fact situation presented. This statute is found in Missouri's general life and accident insurance company law at Chapter 376 RSMo 1949, and lays down rules for the investment of surplus and reserve funds of life insurance companies. The broad language found in the forepart of Section 376.300 RSMo 1949 is indicative of the purpose and scope of such statute, and we quote the mandate as follows:

Honorable C. Lawrence Leggett

"1. All other laws to the contrary notwithstanding, the capital, reserve and surplus of all life insurance companies of whatever kind and character organized under the laws of this state, shall be invested only in the following: * * *"

We are immediately faced with the fact that Section 376.300 RSMo 1949, as amended, is found in Missouri's regular life law, Chapter 376 RSMo 1949, rather than in our stipulated premium plan life insurance company law, Chapter 377 RSMo 1949; nor is it found in Chapter 375 RSMo 1949, entitled "provisions applicable to all insurance companies." In view of the broad language contained in the forepart of this statute, Section 376.300 RSMo 1949, quoted above, its present placement in the regular life law at Chapter 376 RSMo 1949, rather than in Chapter 375 RSMo 1949, is unfortunate. However, a short review of the legislative history of this statute will disclose that its present placement in no way lessens the applicability of its language to a company formed under Missouri's stipulated premium plan life insurance company law found at Sections 377.200 to 377.460 RSMo 1949.

In 1945 the legislature passed Senate Bill No. 90 (L-1945, p. 995) repealing Sections 6031 and 6032, of Article 10, Chapter 37, Revised Statutes of Missouri, 1939, relating to the investment of funds of life insurance companies organized under any law of this state, and enacted one new section relating to the same subject matter and to be numbered and known as Section 6032. It cannot be disputed that at the time of such repeal of Sections 6031 and 6032, and the enactment of the one new Section 6032, such statute continued to remain a part of Article 10, Chapter 37, R. S. Mo. 1939, such Article 10 being entitled "general provisions." Senate Bill No. 90, supra, was approved October 12, 1945, and at such time we find the first provision of the new Section 6032 reading as follows:

"All other laws to the contrary notwithstanding the capital reserve and surplus of all life insurance companies of whatever kind and character organized under the laws of this state, shall be invested only in the following."

Two paragraphs were added to Section 6032, supra, by Senate Bill No. 321 (L. 1945, p. 1004), approved March 26, 1946, but no change whatever was made in the above quoted language,

Honorable C. Lawrence Leggett

and the statute remained a part of the "general provisions" applicable to all insurance companies and was found in Article 10, Chapter 37, R.S. Mo. 1939. In 1949, Senate Bill No. 117 (L. 1949, p. 305) amended Section 6032 as it appeared in Senate Bill No. 321 (L. 1945, p. 1004), and such amendment did not repeal and reenact, but only amended the section and again referred to such statute as Section 6032. This amendment was approved August 10, 1949, and the forepart of the statute continued to read as follows:

"All other laws to the contrary notwithstanding, the capital, reserve and surplus of all life insurance companies of whatever kind and character organized under the laws of this state shall be invested only in the following: * * *"

It is in the 1949 Revised Statutes that we find Section 6032, R. S. Mo. 1939, disappearing from the "general provisions" of the insurance code and appearing as Section 376.300 RSMo 1949 in Missouri's regular life insurance company law. Section 1.120 RSMo 1949, provides:

"The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments."

In this instance we adopt the general rule as reflected in the following language from State ex rel. Sharp v. Knight, 26 S.W. (2d) 1011, 224 Mo. App. 761, l.c. 768:

"The holding in that case as well as the Gantt case is authority for the proposition that the mere arrangement or codification of the statutes by the Legislature, which under our Constitution now takes place every ten years, does not change the applicability of a particular statute as it stood when it was enacted."

Under the foregoing rule quoted from State ex rel. Sharp v. Knight, supra, and in view of the provisions of Section 1.120 RSMo 1949, heretofore quoted, it must be concluded that Section 376.300 RSMo 1949 is to be construed as though it is part and parcel of Chapter 375 RSMo 1949, such chapter being entitled "provisions applicable to all insurance companies." The statute's

Honorable C. Lawrence Leggett

original source and present language confirm this reasoning.

Having concluded that Section 376.300 RSMo 1949 is to be construed as though it is a part of Chapter 375 RSMo 1949, its applicability to a stipulated premium plan life insurance company formed under Sections 377.200 to 377.460 RSMo 1949 is for determination.

Section 376.300 RSMo 1949, as amended, Laws 1953, p. 235, and as further amended by House Bill No. 231, 68th General Assembly, treats solely of the investment of capital, reserve and surplus of all life insurance companies. This statute is of great length and it is not necessary to copy it into this opinion. It is replete with definite directives touching the only types of securities in which insurance companies may invest their capital, reserve, and surplus, save and except their power to purchase and own real estate, which power has previously been discussed in the earlier part of this opinion when Section 375.330 RSMo 1949, was held applicable to a stipulated premium plan life insurance company. Without discussing the several provisions of Section 376.300 RSMo 1949, it is only necessary to state that such statute brings into play the regulatory and supervisory powers of the Superintendent of the Division of Insurance in relation to insurance companies' investments, as distinguished from charter powers of the insurance companies to contract with their policyholders; and under the ruling in the Old Reliable case, heretofore adopted in this opinion when construing the affect of Section 375.330 on a stipulated premium plan life insurance company, it is concluded that Section 376.300 RSMo 1949 is fully applicable to a stipulated premium plan life insurance company.

Having ruled that Sections 375.330 and 376.300 RSMo 1949, as amended, are applicable to a stipulated premium plan life insurance company formed under Sections 377.200 to 377.460 RSMo 1949, the next question posed goes to the right of a stipulated premium plan life insurance company to acquire by gift, retain and invest property which it could not, under the statutes being construed, purchase, retain and invest. We first consider the question of acquisition, as differing from the separate problems touching retention and investment.

The first provision of Section 375.330 RSMo 1949 reads as follows:

- "1. No insurance company formed under the laws of this state shall be permitted to

Honorable C. Lawrence Leggett

purchase, hold or convey real estate,
excepting for the purpose and in the
manner herein set forth, to wit:
* * *". (Underscoring supplied).

Does the word "purchase" as used in the foregoing quotation prohibit an insurance company from accepting real or personal property as a gift? No statutory prohibition against an insurance company's taking of real or personal property by gift has been discovered. In the case of Shepard Paint Co. v. Board of Trustees, 88 Ohio App. 319, 100 N.E. (2d) 248, 1.c. 251, reference to the authorities on the meaning of the word "purchase" is made in the following language:

"The authorities seem to be in agreement that the word 'purchase,' has two significations, a popular but restricted one and a legal but enlarged one. A 'purchase' in the popular acceptance of the term is the transfer of property from one person to another by his voluntary act and agreement founded upon a valuable consideration. The legal or enlarged definition is found in 3 Washburn, Real Property (6th Ed.) 3, Section 1824: 'Purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor becomes substituted in his place as owner by the act of the law.'"

The use of the word "purchase" in the first provision of Section 375.330 RSMo 1949, quoted above, does not suggest that the word should be construed in any other than its plain, ordinary and usual sense, and consequently in this instance we follow the rule laid down in Section 1.090 RSMo 1949, as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

It is concluded that Section 375.330 RSMo 1949, does not prohibit an insurance company subject to such statute from acquiring, by gift without valuable consideration, real property donated to it.

Honorable C. Lawrence Leggett

Consideration is next given to the right of an insurance company, which is subject to Section 375.330 RSMo 1949, to hold and convey real property it has received by gift. Once the insurance company has acquired real property by gift it immediately becomes a part of the assets of such company. This being so, the holding of the same must be subject to all provisions of Section 375.330 RSMo 1949, for the mere holding of the real property represents an investment of the company's assets. No citation of authority is needed on this point. If the holding of such real estate is not consistent with the directives found in Section 375.330 RSMo 1949, the real property should be converted into an asset which the company may hold.

From the opinion request it is noted that one of the items comprehended in the "gift" to the stipulated premium plan life insurance company is all of the common capital stock of Martina Holding Corporation, which corporation owns the fee title to one tract of real estate adjoining a specific tract which was included in the "gift" of real property to the stipulated premium plan life insurance company. The right of the company to accept this common stock as a "gift" must be ruled in favor of its reception by the stipulated premium plan life insurance company upon the same reasoning heretofore applied to real property donated to the company. However, once having acquired the common stock it certainly comes within the terms "capital, reserve and surplus" as they are used in Section 376.300 RSMo 1949, and for any such capital, reserve or surplus to be invested in common capital stock which is not preferred, guaranteed or insured as required by such statute, would be an enlargement of the specific provisions of Section 376.300 RSMo 1949, and the common capital stock should be converted to an asset which may be owned and retained under such statute.

The final question posed in the opinion inquiry seeks a ruling directing the method to be used by the Superintendent of the Division of Insurance in placing a value on any portion of the "gift" property which it is permissible for the stipulated premium plan life insurance company to hold under Sections 375.330 and 376.300 RSMo 1949. Section 376.320 RSMo 1949 directs how bonds or evidences of debt held by a life insurance company doing business in Missouri are to be valued. No statutory directive has been found prescribing a rule for placing a value on unencumbered real estate owned by an insurance company. Such a determination would involve diverse fact situations and well recognized practices within the insurance industry, and should, in the absence of a positive statutory directive, be left to the discretion of the Superintendent of the Division of Insurance and company officers who must on occasion place a valuation on such property.

Honorable C. Lawrence Leggett

CONCLUSION

It is the opinion of this office that Sections 375.330 and 376.300 RSMo 1949, as amended, are applicable to a stipulated premium plan life insurance company formed under Sections 377.200 to 377.460 RSMo 1949; that restrictions found in Section 375.330 RSMo 1949 affecting the purchase of real estate do not apply to an acquisition by "gift" without valuable consideration, but the subsequent holding and conveying of such real estate is subject to the restrictions found in such statute; that common capital stock of a holding company may be acquired by a stipulated premium plan life insurance company by "gift" without valuable consideration, without violating Section 376.300 RSMo 1949, as amended, but the subsequent holding of the common capital stock will violate such statute; and valuation of real estate acquired by a stipulated premium plan life insurance company is not regulated by statute, and must be arrived at by the exercise of discretion on the part of the Superintendent of the Division of Insurance and the company's officers when occasion demands such a valuation.

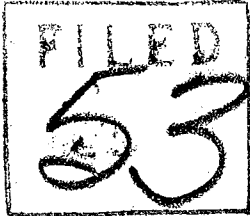
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

CHANGE OF VENUE: When party takes change of venue on account of
prejudice of judge of the Cape Girardeau Court
FEES: of Common Pleas and a judge from one of the
circuit courts is called in to try case, the
VENUE: party taking the change is not required to
deposit \$10 change of venue fee with clerk of
Cape Girardeau Court of Common Pleas.
VENUE IN COURT
OF COMMON PLEAS:



August 3, 1955

Honorable Stephen N. Limbaugh
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Limbaugh:

This is in response to your request for opinion dated
July 21, 1955, which reads as follows:

"Many of the lawyers practicing before the Cape
Girardeau Court of Common Pleas as well as
Honorable J. Henry Caruthers, the judge of such
court, have been somewhat perplexed concerning
the procedure to follow when a change of venue
is taken on account of the prejudice of the
Judge of the Cape Girardeau Court of Common
Pleas.

"Under a recent Supreme Court opinion whenever any
litigant wishes to take a change of venue on account
of the prejudice of the Judge of the Cape Girardeau
Court of Common Pleas, a judge of the circuit court
of any circuit is called in to try the case and
the case is tried in such court.

"In an ordinary change of venue case the party
applying for the change deposits the sum of \$10.00
with the clerk and when circuit courts are in-
volved in the event a special judge presides the
\$10.00 fee is paid to such special judge. Statu-
tory authority for this procedure is Section 508.220
and 508.230 Revised Statutes of Missouri, 1949.

"Change of venue statutes relating to Cape Girar-
deau Court of Common Pleas involve Sections 508.260
to 508.330 Revised Statutes of Missouri, 1949.

Honorable Stephen N. Limbaugh

"In the event a party takes a change of venue on account of the prejudice of the Judge of the Cape Girardeau Court of Common Pleas and a judge from one of the circuit courts in the state is called in to try the case, is the party taking the change required to deposit \$10.00 change of venue fee with the clerk of the Cape Girardeau Court of Common Pleas, and, if so, to whom is the \$10.00 payable?"

The recent Supreme Court opinion referred to is State ex rel. Greamer v. Blair, 270 S.W. 2d 1, in which the court held that Art. 5, Sect. 6 of the Constitution of Missouri, 1945, ("The Supreme Court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and it may establish rules with respect thereto"), and Section 15 (" . . . any circuit judge may sit in any other court at the request of a judge thereof . . ."), supplant prior inconsistent statutes insofar as the latter pertain to granting change of venue on the ground of disqualification of a judge. One statute thus abrogated in part was Section 508.140, RSMo 1949:

"If reasonable notice shall have been given to the adverse party or his attorney of record, the court or judge, as the case may be, shall consider the application, and if it be sufficient, a change of venue shall be awarded to some county in the same, adjoining or next adjoining circuit, convenient to the parties for the trial of the case and where the causes complained of do not exist; provided, that where the application is founded on the interest, prejudice or other objections to the judge or judges, a change of venue shall not be awarded to another county if the parties shall thereupon agree upon a special judge, or if both parties request the election of a special judge to try the case; and in the latter case a special judge shall be elected as provided by law; . . ."

The Blair case makes clear that the proper procedure for a change of venue when the ground is disqualification of a judge is for another judge to be called into the regular judge's court to sit in the trial of the case for him, or for the Supreme Court to transfer temporarily a judge to the court where the case is pending.

Honorable Stephen N. Limbaugh

Sections 508.220, 508.230, and Sections 508.260, 508.270, which pertain more directly to the Cape Girardeau Court of Common Pleas, were not involved in the above case. Section 508.220 states, however, that:

"Whenever any change of venue is applied for in any civil cause from any circuit court of any county, or city constituting a county, to any other county or such city, in another circuit, (emphasis added) the party or person applying for such a change of venue shall, with his application, deposit with the clerk of the circuit court the sum of ten dollars; and thereupon, if such change of venue is awarded the clerk of said court shall transmit said sum of ten dollars, together with the transcript and proceedings in the cause, to the clerk of the court to which the removal is ordered;
. . . "

State ex rel. v. Flournoy, 160 Mo. 324, makes clear that the ten dollar fee is to be paid only by a party applying for a change of venue out of the county. Since there does not now exist a method of transfer to another county because of the prejudice of the judge, Section 508.220 applies no longer to this ground of removal.

CONCLUSION

It is the opinion of this office that when a party takes a change of venue on account of the prejudice of the judge of the Cape Girardeau Court of Common Pleas and a judge from one of the circuit courts is called in to try the case, the party taking the change is not required to deposit the ten dollars change of venue fee with the clerk of the Cape Girardeau Court of Common Pleas.

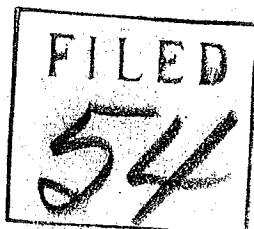
Yours very truly,

JOHN M. DALTON
Attorney General

WLaB:gm

SOIL CONSERVATION DISTRICT:
SMALL WATERSHED:

Supervisors of a soil conservation district may administer the business of that portion of a small watershed which lies within the soil conservation district of which they are supervisors.



January 13, 1955

Honorable J. H. Longwell, Director
Division of Agricultural Science
University of Missouri
Columbia, Missouri

Dear Sir:

Your recent request for an official opinion of this office is as follows:

"The enactment of Public Law 566 by the 83rd Congress, providing for the development of small watershed programs, raises a question of the administration of these programs.

"The size of a small watershed is limited by the law to 250,000 acres. Such an area may lie entirely or in part within the boundaries of a soil conservation district. Soil conservation districts are established under the provisions of Senate Bill Number 80, 62nd General Assembly.

"The question on which the State Soil Districts Commission requests an opinion from you is, do the provisions of the State Soil Districts Law (Senate Bill No. 80) permit the supervisors of a soil conservation district to administer the business of a small watershed, organized under the provisions of Public Law 566, that may lie entirely or in part within the boundaries of that soil conservation district?"

In order to determine whether the supervisors of a soil conservation district may administer the business of a small watershed,

Honorable J. H. Longwell, Director

as such watershed is set forth and described in your above letter, we must, of course, examine the law governing soil conservation districts, and particularly the authority vested in the district supervisors. The soil district law is embodied in Chapter 278, RSMo 1949. The duties and powers of the soil district and its supervisors are set forth in Section 278.120 RSMo 1949, which reads:

"1. Any soil district organized under the provisions of this law shall be a body corporate and shall possess only such powers as herein provided, but any such powers possessed by said body corporate shall be particularly limited by the following provisos; provided, that the private property of any land representative or owner of property in such soil district shall be exempt from execution for the debts of the body corporate or soil district and no land representative or owner of property within said soil district shall be liable or responsible for any debts of the body corporate or soil district, and provided further, that no property of any character, title to which is not vested in said soil district, or a soil district as the case may be, shall ever be subject to any lien for any claim or judgment of or against said district, or a soil district, as the case may be. Any soil district so organized shall be officially known and titled 'The Soil District of County,' and shall be so designated by the county court by order of record, and in that name shall be capable of suing and being sued and of contracting and being contracted with.

"2. A soil district through the board of soil district supervisors thereof shall have the following authority and duty in addition to other authority and duty granted in other sections of this law;

"(1) To promote all reasonable measures for the saving of the soil within that soil district; and all such measures shall be in general

Honorable J. H. Longwell, Director

agreement with those currently advocated by the college of agriculture of the University of Missouri for saving the productive power of Missouri farm land;

"(2) To cooperate or enter into agreements with, and to aid within the limits of appropriations duly made available to it by law, any agency, governmental or otherwise, or any land representative within that soil district, in the saving of the soil within that district; and all such cooperations or agreements shall be in accord with the policies of the state soil districts commission; and any land representative of farm land within that soil district shall be eligible to enter into such cooperations or agreements with the soil supervisors; and no program or procedure of soil conservation shall be ordered or executed by the soil supervisors on any farm without the full consent and agreement of the land representative of that farm;

"(3) To make available to any land representative within that soil district, through existing agencies if agreements with them seem feasible, or by such other feasible means as the supervisors shall prescribe, such services, materials, and equipment as will assist such land representatives to carry on operations for the saving of the soil;

"(4) To accept grants, gifts, and contributions in money, services, or materials from the United States or any of its agencies, and to use or expend such grants, gifts or contributions in carrying on the soil district operations; and such use or expenditure shall be in accord with the policies of the state soil districts commission;

"(5) To make and execute contracts and other legal instruments, necessary for the saving of the soil in that district, subject to approval by the state soil districts commission;

Honorable J. H. Longwell, Director

"(6) To accept for the purpose of saving soil in that district, contributions in money, services or materials from any source not otherwise provided for herein, and to enter into such agreements with land representatives as will tend to prevent future wastage of the soil presently benefited by these contributions."

We believe that under paragraph (2) above, the supervisors would be authorized to administer the business of such part of a small watershed as lies within their soil conservation district. Paragraph (2) authorizes them to "aid * * * any agency, governmental or otherwise * * * in the saving of the soil within that district. * * *" To administer the business of that part of a watershed lying within the said conservation district would be "aiding a governmental agency in the saving of the soil;" manifestly the administration of the supervisors would be limited to that part of the watershed lying within their soil conservation district, since, in their capacity as supervisors they could not have any authority outside of the district.

We note that Public Law 566, enacted by the 83rd Congress, providing for the development of small watershed programs, which you refer to in your letter, which law was approved August 4, 1954, defines "local organization" as follows on page 1 of such act:

"* * * any State, political subdivision thereof, soil or water conservation district, flood prevention or control district, or combinations thereof, or any other agency having authority under State law to carry out, maintain and operate the works of improvement."

CONCLUSION

It is the opinion of this department that supervisors of a soil conservation district may administer the business of that portion of a small watershed which lies within the soil conservation district of which they are supervisors.

Honorable J. H. Longwell, Director

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

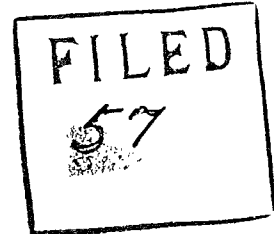
Very truly yours,

John M. Dalton
Attorney General

HPW:ld;sm

INHERITANCE TAX: Property or money transferred to a trustee
TRUSTS: for the purpose of beautification and care
of the graves of testator and his wife, is
subject to Missouri inheritance tax.

January 6, 1955



Honorable Frank W. May
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. May:

Your letter dated December 29, 1954, requesting
an opinion of this office reads:

"I would like to have an opinion on the
question of State Inheritance Tax.

"The deceased has a Will and left quite
a portion of his estate to Trustees for
the purpose of placing flowers upon his
and his wife's graves every Saturday
morning until all of the trust was ex-
pended.

"The trust provision provides that the
trust fund is to be placed in the United
Bank of Farmington and, that the flowers
are to be purchased from a florist and,
not less than \$1.00 spent each week for
flowers for his and his wife's graves.

"If there is a tax on the amount left in
trust, would there be any exemptions, if
so, how much?"

The provision in the will creating the trust is
as follows:

"THIRD: All of the rest, residue and re-
mainder of my estate whatsoever, real,
personal and mixed, and wherever situated,
I want converted in to cash, and the pro-
ceeds to be deposited in the United Bank

Honorable Frank W. May

of Farmington as a trust fund. This money to be used only for flowers, and the upkeep of the graves of, _____ Charles C. _____, and wife Glenn _____. I want fresh flowers from a greenhouse put in a nice container, and placed at the head of each grave on _____ Saturday of every week the year round as long as the fund lasts. Not less than one dollar's worth for each grave. The graves to have a slight mound at all times, also, the grave lot to be kept clean and mowed off during the summer season. -- all expenses to be paid out of this fund."

You stated in a subsequent letter that the amount of the trust fund would be approximately \$6,000.00.

The fund is made subject to inheritance tax by Section 145.020, RSMo 1949, which reads, in part, as follows:

"1. A tax is hereby imposed upon the transfer of any property, real, personal, or mixed, or any interest therein or income therefrom in trust or otherwise, to persons, institutions, associations, or corporations, not herein exempted, in the following cases:

"(1) When the transfer, by will or the intestate laws, is from any person who is a resident of this state at the time of his death;"

* * *

Exemptions from the inheritance tax are provided by Section 145.090 and Section 145.100, RSMo Cum. Supp. 1953. Those sections read:

"145.090. Exemptions. ---The following shall be exempt from taxes imposed in this chapter:

"(1) All transfers, direct and indirect, including transfers from a trustee or trustees to another trustee or trustees,

Honorable Frank W. May

of any property or beneficial interest therein to be used solely for county, municipal, religious, charitable or educational purposes in this state.

"(2) All transfers, direct and indirect, including transfers from a trustee or trustees to another trustee or trustees, of any property or beneficial interest therein to be used solely for county, municipal, religious, charitable or educational purposes in any other state or territory of the United States, foreign state or nation, which at the time of the death of the decedent imposed no legacy, succession or death tax of any character in respect to property transferred for similar uses in this state, or which by law exempts transfers made for similar uses in this state from all such tax on condition that this state shall exempt transfers made for such uses in such other state, territory or nation from any such taxes imposed by this state.

"(3) All transfers of any property or beneficial interest therein not exceeding the clear market value of twenty thousand dollars in excess of the aggregate value of all marital rights which would accrue to the surviving spouse upon renunciation of a will or death of the decedent intestate to a surviving husband or wife.

"(4) All transfers of any property or beneficial interest therein not exceeding the clear market value of fifteen thousand dollars to any of the lineal descendants of the decedent who may be idiotic, insane, blind, deformed, or otherwise mentally or physically incapacitated from earning a living.

"(5) All transfers of any property or beneficial interest therein of the clear

Honorable Frank W. May

market value of five thousand dollars to each of the persons other than the surviving husband or wife or an incapacitated lineal descendant listed in subdivision (1), subsection 1 of section 145.060.

"(6) All transfers of any property or beneficial interest therein of the clear market value of five hundred dollars to each of the persons described in subdivision (2), subsection 1 of section 145.060.

"(7) All transfers of any property or beneficial interest therein of the clear market value of two hundred and fifty dollars to each of the persons described in subdivision (3), subsection 1 of section 145.060.

"(8) All transfers of any property or beneficial interest therein of the clear market value of one hundred dollars to each of the persons described in subdivision (4), subsection 1 of section 145.060.

"(9) All transfers of any property or beneficial interest therein of which the clear market value shall be less than one hundred dollars shall not be subject to any tax."

"145.100. Transfers to religious, charitable, etc., institutions exempt.--
1. When any property, benefit or income shall pass to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent or charitable purpose in this state, or to any trustee, association, or corporation, bishop, minister of any church, or religious denomination in this state to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes, whether such transfer be made directly or indirectly, the same shall not be subject

Honorable Frank W. May

to any tax, but this provision shall not apply to any corporation which has a right to make dividends or distribute profits or assets among its members.

"2. The exemption herein granted shall extend to persons, organization, associations, and corporations organized under the laws of other states and residents therein, provided the law of the other state grants to persons, organizations, associations, and corporations organized under the law of Missouri and resident therein, a like and equal exemption."

The type of trust at hand is apparently permitted by Section 214.140, RSMo 1949. The trusts created under Section 214.140 are declared in Clark vs. Crandall, 319 Mo. 87, 5 S.W. (2d) 383, 388, to be private trusts, and not public or charitable trusts. There being no exemption by statute of private trusts of this type, we must conclude that none exists.

CONCLUSION

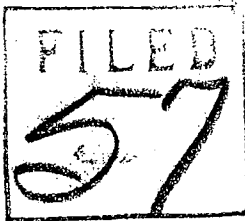
It is, therefore, the opinion of this office that property or money transferred to a trustee for the purpose of beautification and care of the graves of testator and his wife, is subject to Missouri inheritance tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

CONSTITUTIONAL LAW: That part of Section 337.060, RSMo 1949, which
OSTEOPATHS: gives the Missouri Association of Osteopathic
RENEWAL LICENSES: Physicians and Surgeons the power to determine
PROFESSIONS: the educational programs which will be necessary for renewal licenses of osteopaths of Missouri, is unconstitutional and void.



August 9, 1955

Honorable Joseph W. Martino
Representative, 8th District
City of St. Louis
2162 Allen
St. Louis, Missouri

Dear Mr. Martino:

In your letter to us you request an opinion as follows:

"I respectfully request that you furnish me an opinion as to whether the following practice is a proper or an improper one under the law:

"Section 337.060, V. A. M. S., provides for annual renewal of osteopaths' licenses to practice in this State. The renewal is under the jurisdiction of the state board of osteopathic registration and examination. The statute contains a proviso, in these words:

".....provided that satisfactory evidence is presented to the board that the said licensee in the year preceding the application for renewal attended at least one of the two-day educational programs as conducted by the Missouri Association of Osteopathic Physicians and Surgeons, or its equivalent as approved by the Missouri Association of Osteopathic Physicians and Surgeons".

"The Missouri Association of Osteopathic Physicians and Surgeons is a private, pro forma decree corporation. It was formed on January 11, 1921, in the Circuit Court of Macon County, Missouri. Article III of its constitution provides, in its entirety, that:

"Those eligible for membership shall be the present members of "The Missouri Osteopathic Association", members of "The American

Honorable Joseph W. Martino

Osteopathic Association", and such other members as shall be elected in accordance with the By-Laws'.

"Exercising the power delegated it by Section 337.060, the Missouri Association of Osteopathic Physicians and Surgeons approves the following activities for which annual educational credit may be taken by osteopaths in renewing their licenses:

1. Its own state convention.
2. The American Osteopathic Association convention.
3. The Kansas City Child's Health Conference.
4. The Kirksville Refresher Course.

"In connection with the granting of approval of these courses, the Missouri Association of Osteopathic Physicians and Surgeons requires that the applicant for license renewal must join the Association and pay dues (which vary, but which are presently \$75.00 a year), or, in the alternative, pay a penalty equal to the amount of such dues.

"More particularly, should the licensee attend the state convention above, he must be a member of the Association. Should he elect the American Osteopathic Association convention, he is not eligible to attend unless he is a member of a Divisional Society, such as the Missouri Association of Osteopathic Physicians and Surgeons. Should he attend, either, the Kansas City Child's Health Conference or the Kirksville Refresher Course, he is required by the agency conducting the course, first, to pay a registration fee of \$10.00 or \$15.00 and, second, to show either evidence of membership in the Missouri Association of Osteopathic Physicians and Surgeons or pay an additional sum equal to that Association's annual dues. What is done with the monies so collected in lieu of the yearly dues is not known, at least to me, and I think is not known to the average osteopathic practitioner.

"Magazine advertising outlining this requirement and showing the dues (or penalty) to be \$75.00 in 1955 and \$85.00 in 1953, is attached.

"It may or may not be a factor in your determination, however, I know that it is not required that an osteopath

Honorable Joseph W. Martino

applying for license renewal attend these approved courses. The Missouri Association of Osteopathic Physicians and Surgeons announces that there is no such requirement. The only things which are strictly enforced at these courses is the payment of the two fees as stated above or the proof of membership in the Missouri Association of Osteopathic Physicians and Surgeons, as I have described in the next-to-last preceding paragraph.

"It has been complained to me that this statute should be repealed or amended. The complainants are osteopaths who protest (a) that they receive no benefits from the Missouri Association of Osteopathic Physicians and Surgeons, or so slight benefits that they do not wish to be members; (b) that they regard the Association's combination of dues and assessments as exorbitant; (c) that they believe this statutory system to be improper or that the system is an unlawful misuse of the powers under the statute; and (d) that there are many courses of educational study within and without Missouri, more worthy of attendance, which they are denied, in effect, because they are not usable for credit on license renewal.

"I do not mean to add information and authorities useless to you. However, I would like to state some rules which I have attempted to follow in considering similar matters, for I would like to know that such rules are correct. It has been my understanding that a law enacted by the General Assembly may not confer unreasonable or arbitrary power to grant or refuse licenses--and that a board or officer so vested with a power to grant or refuse licenses may prescribe rules and regulations only insofar as they are reasonable. It has been my further understanding that rules as to an applicant's qualifications for license are reasonable so long as they pertain to his suitability to perform the acts for which the license is sought (Gandy v. Borrás, 154 So. 248, 114 Fla. 503).

"For example, an applicant may properly be required to meet certain minimum standards, as to age (Garman v. Myers, 80 P. 2d 624, 183 Okla. 141), education (Barbers Commission of Mobile County v. Hardeman, 21 So. 2d 118, 31 Ala. App. 626), experience (Pincourt v. Palmer, 190 F. 2d 390, C. A.), financial responsibility (Mosesian v. Parker, 112 P. 2d 705, 44 Cal. App. 544), passing grade on examination (State ex rel Sill v. Examining Board of Master Electricians, 129 So. 427,

Honorable Joseph W. Martino

14 La. App. 17), good moral character (Murray v. Williams, 60 A. 2d 402, 162 Pa. Super. 633), etc. I have not understood that an association delegated by law to participate in licensing can reasonably require the applicant to join the association or pay a penalty for not doing so."

In 70 C. J. S., Physicians and Surgeons, at page 826, it is stated:

"In so far as practice within a particular state is concerned, the legislature thereof has power to require a license or certificate for the practice of medicine, surgery, dentistry, or other healing art, * * *."

And also in 70 C. J. S., Physicians and Surgeons, at page 913, it is stated:

"In general, statutes have been held valid which provide for the issuance of annual licenses to persons practicing specified branches of the healing arts and require those licensed to obtain annual renewals, or which require those who have been licensed in the state, but who have left the state and permitted their license to expire, to make a satisfactory showing before a state board in order to obtain a renewal, or which require practitioners to complete specified educational work during each year as a prerequisite or condition to the right to practice their profession or to have their licenses renewed, provided they either fix the standard of the educational work required or delegate to a board the authority to set a required standard; and a requirement for the payment of annual renewal fees is not invalid. * * *."

In 33 Am. Jur., Licenses, page 336, it is stated:

"It is well settled that the state under its police power has the right to regulate any business, occupation, trade, or calling in order to protect the public health, morals, and welfare, subject to the restrictions of

Honorable Joseph W. Martino

reasonable classification. This power to regulate includes the power to license; and it is the settled general rule that to protect the health, morals, and welfare of the public a state can license an occupation, trade, or calling. * * *."

Thus, it can be seen from the above cited authorities that such a delegation of authority as we have here by the State Legislature, must be within the constitutional limits of the Constitution of Missouri, 1945.

Section 337.060, RSMo 1949, authorizes the State Board of Osteopathic Registration and Examination to issue a renewal license to a licensed osteopath in the State of Missouri on the payment of a \$2.00 fee and when "satisfactory evidence is presented to the board that the said licensee in the year preceding the application for renewal attended at least one of the two-day educational programs as conducted by the Missouri Association of Osteopathic Physicians and Surgeons, or its equivalent as approved by the Missouri Association of Osteopathic Physicians and Surgeons."

From this statute, it is seen that the State Legislature has delegated to a private association or organization the power to determine arbitrarily and with uncontrolled discretion where, when and how the educational courses are to be attended by the osteopaths seeking a renewal license, and the amount to be paid for such courses. Such delegation of uncontrolled discretion to a private organization is unconstitutional and void. This is on the ground that it is a delegation of power to a private organization or association to determine the rules and regulations that will control an osteopath of Missouri in attending refresher courses that are mandatory in order to obtain a renewal license.

In an opinion rendered by this office on December 31, 1954, to the Honorable L. A. Hansen, D.S.C., Secretary, Missouri State Board of Chiropody, concerning a proposed statute on the regulation of chiropodists, this office stated that the enactment of a provision by the State Legislature that would give to private organizations the power to determine what acts or omissions by chiropodists could authorize revocation of a license granted by the State of Missouri would be an unconstitutional delegation of legislative power to the private organizations. Also in the case of State vs. Crawford,

104 Kan. 141, 177 P. 360, l.c. 361, it was stated:

"But none of the cases cited has ventured so far afield as to intimate that the legislature might delegate to some unofficial organization of private persons, like the National Fire Protective Association, the power to promulgate rules for the government of the people of this state, or for the management of their property, or that the legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced."

Also see the case of State ex rel. Week et al. vs. Wisconsin State Board of Examiners in Chiropractic et al., 30 N.W. (2d) 187. This case is almost directly in point with the problem here involved. In that case the Wisconsin Legislature by statute provided the following, l.c. 188:

"(7) All licenses issued by the board shall expire on the thirty-first day of December following the issue thereof, except that any holder of a license may have the same renewed from year to year by the payment of an annual fee of five dollars; provided, that satisfactory evidence is presented to the board that said licensee in the year preceding the application for renewal has attended at least one of the two-day educational programs conducted, supervised and directed by the Wisconsin Chiropractic Association and exemption from this requirement shall be granted only upon showing satisfactory to said board that attendance at said educational programs was unavoidably prevented."

The Supreme Court of Wisconsin held that such delegation by the Legislature of Wisconsin was unconstitutional in that it did not fix any standard for the program to be offered. The Court stated at page 189:

"* * * The difficulty is that the legislature has fixed no standard of a program which must be attended nor has it delegated to any board the authority to approve the program to be offered. It has merely provided by whom the

Honorable Joseph W. Martino

program shall be given. In Ex parte G. B. Gerino, 1904, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249, where the statute provided the State Board of Medical Examiners should be elected from three certain medical societies, while upholding the statute the court said it 'could not be upheld at all if it were put upon the ground that in so doing the state is acting for the benefit of any one or all of the medical societies or schools of medicine existing in the state.' We conclude here the state was acting for the benefit of the association primarily, which is not within the legitimate exercise of police power. See 11 Amer. Jur. 1093." (Underseoring ours).

Thus, it would seem that the reasoning in this opinion cited above and the cases cited above, that the part of the statute here in question which gives the Missouri Association of Osteopathic Physicians and Surgeons the arbitrary power to determine what educational programs shall be necessary in order for an osteopath to receive a renewal license is unconstitutional and void as in violation of Article III, Section 1, Constitution of Missouri, 1945, which states:

"The legislative power shall be vested in a senate and house of representatives to be styled 'The General Assembly of the State of Missouri'."

Thus, this delegation of authority to the Missouri Association of Osteopathic Physicians and Surgeons is unconstitutional and void. It is as if never enacted and it gives no authority to the Missouri Association of Osteopathic Physicians and Surgeons. This rule is thus stated in City of St. Louis vs. Polar Wave Ice & Fuel Co., cited supra, at page 998 as follows:

"When a statute is adjudged unconstitutional, it is as if it had never been, rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true as to any part of an act which is found to be unconstitutional and which consequently is to be regarded as

Honorable Joseph W. Martino

having never at any time, possessed any legal force."

CONCLUSION

It is the opinion of this office that that part of Section 337.060, RSMo 1949, which gives the Missouri Association of Osteopathic Physicians and Surgeons the power to determine what educational programs shall be necessary for an osteopath to attend in order to obtain a renewal license is unconstitutional and void, and that the Missouri Association of Osteopathic Physicians and Surgeons has no authority to act under such section since it is unconstitutional and void.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Harold L. Volkmer.

Very truly yours,

JOHN M. DALTON
Attorney General

HLV:irk:gm

LOTTERIES:

The Puritan Dairy "Knocking Man" scheme is a lottery prohibited by the laws of the state of Missouri.



August 29, 1955

Honorable John R. Martin
Assistant Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

This is in response to your request for opinion dated August 12, 1955, which reads as follows:

"This office has received a complaint against the Puritan Dairy 'Knocking Man' promotion.

"I am enclosing a copy of the advertisement which appeared in the Carthage Evening Press, and request that your office examine said advertisement and give this office an opinion as to whether or not this constitutes a lottery."

In regard to your inquiry, Article III, Section 39, of the Constitution of Missouri, 1945, should be noted:

"The general assembly shall not have power:

. . .

"(9) To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; * * *".

Section 563.430, RSMo 1949, implementing the Constitution, provides:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery

Honorable John R. Martin

as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

The essential elements of a lottery are: (1) prize; (2) consideration; and (3) chance. State ex inf. McKittrick v. Globe Democrat Publishing Company, 341 Mo. 862, 110 S.W.(2d) 705.

The promotion scheme about which you are concerned is handled in this manner: each day a Puritan Dairy "Knocking Man" calls on a certain number of homes, asking, "Why do you prefer Puritan Dairy Products?" For the best answer, he awards ten dollars (\$10) to the housewife if she has on hand any portion of Puritan Homogenized Milk in a one-half gallon container, and five dollars (\$5) if she has on hand any portion of another Puritan product or facsimile drawing of the carton. The winners must allow their names and pictures to appear in Puritan advertisements. Whether she wins or not, each participant receives a consolation prize of one quart of Puritan Homogenized Milk.

It is clear that there is a prize in this scheme of either ten dollars (\$10), five dollars (\$5), or a quart of Puritan Homogenized Milk. Consideration exists for the first two prizes because the participant must have bought a Puritan Product before qualifying. Induced by the potential prize to pay consideration for Puritan Dairy products, the housewife has thus given up both time and money to take part in this promotion campaign.

As far as the element of chance is concerned, it may be argued that only skill or ability to answer well the question, "Why do you prefer Puritan Dairy Products," is involved. Yet, to be chosen as a participant at all, or perhaps to have the fortune to be the only

Honorable John R. Martin

housewife with Puritan products on hand, involves an event "incapable of ascertainment or accomplishment by means of human foresight or ingenuity," U.S.V. Rich, 90 Fed. Supp. 624, at page 627, defining "chance" in a lottery. Missouri courts have gone far in holding that a scheme may be a lottery, even though some skill is involved, whenever any degree of chance is present. See State ex inf. McKittrick v. Globe Democrat Publishing Company, supra, at page 717:

"It is impossible to harmonize all the cases. But we draw the conclusion from them that where a contest is multiple or serial, and required the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. This was directly decided in Coles v. Odhams Press, Ltd., supra, when it was held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole."

CONCLUSION

It is, therefore, the opinion of this office that the Puritan Dairy "Knocking Man" scheme is a lottery prohibited by the laws of the state of Missouri.

Yours very truly,

JOHN M. DALTON
Attorney General

WLaB:ld

FEDERAL SOLDIERS' HOMES: : A woman is not entitled to admission
DEFINITIONS: : to the Federal Soldiers' Home by
: virtue of being the mother-in-law
: of a former serviceman.
.....



January 5, 1955

Honorable Marvin H. McDaniel
Superintendent
State Federal Soldiers' Home
of Missouri
St. James, Missouri

Dear Sir:

Your letter of December 30, 1954, requesting
an opinion of this office reads:

"I wish to refer you to Missouri Revised
Statutes 1949, Section 212.140, Who May
Be Admitted.

"This is to request you furnish us with
an official opinion with reference to the
above referred to Statute as follows:

"Would a woman, who has a son-in-law,
who served in the United States Armed
Services be entitled to admission to
this Home as a mother?"

Section 212.140, RSMo 1949, which sets the stan-
dards of admission to the Federal Soldiers' Homes,
reads as follows:

"The soldiers and sailors who shall be
entitled to admission into said home
shall be citizens of the state of
Missouri, who were honorably discharged
from the service of the United States,
and who are in indigent circumstances,
and from any disability, not received
in any illegal act, are unable to sup-
port themselves by manual labor, and
that the aged mother, wife or widow of
such soldier or sailor, and army nurses,
who served with the armies of the United

Honorable Marvin H. McDaniel:

States or such ex-members of the enrolled Missouri militia, who served ninety days or more in the field during the civil war, shall also be entitled to admission in said home, provided they be in indigent circumstances and unable to support themselves by manual labor."

Your request requires us to determine whether the phrase "aged mother * * * of such soldier or sailor" includes mothers-in-law of such former servicemen.

In construing the meaning of the word "mother" we are guided by Section 1.090, RSMo 1949, which reads:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

The word "mother" is not a technical word, and is ordinarily taken to mean "female parent". "Mother-in-law" is ordinarily understood to mean the mother of one's spouse. (Black's Law Dictionary, 4th Edition, Page 1164). We conclude that since the word "mother" is not ordinarily understood to include one's mother-in-law, it was not the intention of the Legislature to include mothers-in-law within that category, and that it was not the intention of the Legislature to make eligible for admission to the Home mothers-in-law of former servicemen.

CONCLUSION

It is, therefore, the opinion of this office that a woman is not entitled to admission to the Federal Soldiers' Home by virtue of being the mother-in-law of a former serviceman.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

PMcG:irk

JOHN M. DALTON
Attorney General

TOWNSHIP COLLECTORS:
PERSONAL REPRESENTATIVE
TO SETTLE ACCOUNTS, WHEN:
DISPOSITION OF TOWNSHIP
PERSONAL PROPERTY:

Personal representative of deceased township collector to have charge of all books, accounts, money or other personal property of township in possession or control of collector at time of death. Personal representative to make final settlement of accounts with county court in same time and manner as collector

personally, provided by Sec. 139.420, except personal representative not required to pay tax funds to county treasurer and ex officio collector, or make return of delinquent taxes to county court. He shall turn over possession and control of all such township books, accounts, money or other personal property to successor-collector less any legal fees earned during term and previously unpaid deceased.

February 1, 1955

Mr. Leon McAnally
Prosecuting Attorney
Dunklin County
Dunklin County Courthouse
Kennett, Missouri



Dear Sir:

This department is in receipt of your recent request for a legal opinion, which reads as follows:

"The collector of Salem Township died recently and has funds in the Bank under his name as collector in several different accounts such as school fund etc. As of this date his successor has not been appointed. The family of deceased, County Clerk and County Court, it seems, have received several different opinions from various sources as to procedure to follow in order to transfer these funds from deceased' account to those entitled to receive same and to allow deceased' family to retain collector fees which deceased was entitled to retain. None seem willing to take action without an opinion from the Attorney General. Will you please give me your opinion as to who should take charge of the accounts and books of the deceased collector."

It has long been an elementary principle of law that when one dies owning personal property, the title, right of possession or control of same immediately passes to his executor or administrator and not to his heirs. The executor or administrator holds such property pending administration proceedings, and after payment of debts and other legal charges finally turns over possession of the remainder to the legatees named

Mr. Leon McAnally

in decedent's will, or in event he dies intestate, to his heirs. This procedure must be followed in every instance, regardless of whether or not the decedent left any creditors, and it is so well established by applicable Missouri statutes and court decisions, that it is believed to be unnecessary to cite any authority on the subject.

The administration statutes of Missouri are quite clear on the principle of law mentioned above, and no one doubts the authority under same of an executor or administrator to take possession and control of his decedent's personal property, when such decedent was a private citizen. However, when the deceased was a public official and had personal property in his possession and under his control at the time of his death belonging to a county or other political subdivision of the state, would the personal representative as such take charge of, and be legally accountable for such county property? If not, then who would be required to take possession and be accountable to the county for its property?

It is our contention that the personal representative of the deceased public officer, and in the instant case, the personal representative of the deceased township collector shall take charge and be responsible for the township personal property until such time as it can be turned over to the deceased official's successor, by said personal representative.

In support of our contention, we call attention to the general rule requiring a public officer or his legal representative to turn over possession of all public property received by him in his official capacity, to his successor. Said general rule is given under the title of "Public Officers," Volume 43, page 123 of American Jurisprudence, and is as follows:

"It is the duty of every public officer, or of his personal representative on his death, to account for and pay over or deliver to his successor all public moneys, books, papers, and other property in his possession belonging to the office. If a public officer does not have authority to receive anything but coin, treasury notes, national bank notes, or other current money, auditing officials have no right to accept anything less in the settlement of his accounts, such as checks, notes, drafts, bonds, or other obligations. If,

Mr. Leon McAnally

however, the officer has the funds on deposit in an approved depository, he need not withdraw them or physically hand them over; he may direct the bank in which they are on deposit to transfer them to the account of the successor."

Again, Section 52.190, RSMo 1949, prescribes the procedure a personal representative of a deceased county collector shall follow in taking possession of tax books, money or other county property which was in the possession of such decedent and turning over possession of same to the successor in office. Said section reads as follows:

"Death of collector--duties of his representatives.--Whenever any collector shall die after he has received the tax book for any year, his legal representatives shall hand over at once to the county clerk the tax book, and shall also pay over to his successor in office, at once, out of the estate, all moneys which have been collected by the deceased collector and then in his hands."

We are fully aware of the fact that no Missouri statutes specifically provide that the executor or administrator of a deceased township collector shall immediately take charge of, be responsible for, and the disposition he shall make of all township personal property in the lawful possession of the collector at the time of his death.

While township collectors are not specifically referred to as such in Section 65.510, RSMo 1949, providing that when the term of any township officer expires he shall turn over possession of all books, papers, or other property belonging to the office, to his successor and take his receipt therefor, or in case of the official's death, this duty shall be performed by his personal representative. The section refers to the expiration of the officer's term, but it is our contention that its provisions would also govern in those instances when the official dies before the end of the term for which he was elected or appointed. Said section reads as follows:

"Whenever the term of office of any township officer shall expire, and others are elected or appointed and qualified as their

Mr. Leon McAnally

successors, such successors shall, immediately after entering upon the duties of their office, demand and receive from his or their predecessors, or their legal representatives, all the books, papers and money under his or their control belonging to such office, and such books, papers and other property shall be delivered upon oath that the same are all the moneys, books, papers and other property under his control belonging to such township; duplicate receipts shall be given the outgoing officer for the same, who shall retain one copy and deliver the other to the township clerk, who shall charge the incoming officer with the value thereof."

It is believed that the legal principle mentioned above is fully applicable in all instances when the deceased was a public official, and had property of a political subdivision of the state in lawful possession and control at the time of his death, there being no evidence of any legislative intent to provide an exception to the general rule, or to enact any statute authorizing a different method of procedure in such instances. Therefore, it is our further belief that the above quoted sections of the statutes indicate a legislative intent that the personal representative of the deceased official is to take charge of all personal property of the political subdivision of the state of which he was an officer, and to properly account for it in the manner provided by said sections.

In view of the foregoing, and in answer to the inquiry of the opinion request, it is our thought that the executor or administrator of the deceased township collector referred to in said inquiry shall take possession and have charge of all books accounts and any other personal property of the township which said deceased collector, by reason of his office, had possession and control of at the time of his death. Said executor or administrator shall be legally responsible for, and shall turn over possession and control of all such township personal property to the successor of the deceased, less any legal fees or commissions to which the deceased was entitled for official services rendered during his term, and which fees shall become a part of the assets of his estate.

The opinion request contains only one inquiry, but by a later request of the writer, we have been authorized to include a second inquiry, and to treat same as a part of the original request.

The second inquiry asks with whom the personal representative

Mr. Leon McAnally

of the deceased township collector shall make a final settlement of his accounts of township funds or property for the deceased, before possession and control of same are turned over to the successor-collector.

Under the provisions of present statutes pertaining to the administration of the estates of deceased persons, administration is had only upon that property comprising the estate of the deceased, and the personal representative is not ordinarily chargeable with any property not a part of the estate. However, there is an exception to this general rule, as we have previously shown, in those instances when a township officer, or in case of his death his personal representative, takes charge of all township personal property in control or possession of said official at the time of his death, and in due time turns over possession of same to the successor in office. Such procedure is authorized by Section 65.510, supra.

No section of the statutes specifically states that the personal representative of a deceased township officer shall make settlement of accounts for the deceased with a particular officer, or in a particular manner. Section 139.420, RSMo 1949, requires a township collector to personally make his final settlement with the county court of his county, within the time and manner provided therein. Said section reads in part as follows:

"1. The township collector of each township, at the term of the county court to be held on the first Monday in March of each year, shall make a final settlement of his accounts with the county court for state, county, school and township taxes; produce receipts from the proper officers for all school and township taxes collected by him, less his commission; pay over to the county treasurer and ex officio collector all moneys remaining in his hands, collected by him on state and county taxes; make his return of all delinquent or unpaid taxes, as required by law, and make oath before the court that he has exhausted all the remedies required by law for the collection of such taxes."

It is our thought that since the personal representative is chargeable with such township property and must turn same over to the successor, and also since he acts for and in behalf

Mr. Leon McAnally

of decedent, he is the proper person to make the settlement of accounts for the deceased to the same extent and in the same legal manner as the collector might have done. Section 139.420, supra, requires the township collector to make final settlement of his accounts with the county court, and it is believed that the personal representative shall also follow the procedure therein provided with two exceptions, namely: (1) The personal representative is not required to pay over all state and county tax money remaining in his hands to the county treasurer and ex-officio collector. (2) He is not required to make return of all delinquent or unpaid taxes and make the statement under oath to the county court that he has exhausted all legal remedies to collect such taxes.

The reasons for such exceptions are quite obvious, when it is recalled that the personal representative is authorized to turn over the township personal property to the successor in office, and to no other.

The personal representative is not legally authorized to collect any taxes in the township, consequently that part of the section regarding tax collections, does not apply to the personal representative.

In answer to the second inquiry, it is our thought that the personal representative of the deceased township collector shall make final settlement of the deceased's accounts with the county court, in the same manner provided by Section 139.420, supra, for the making of such settlement by township collectors personally, with the two exceptions mentioned above.

CONCLUSION

It is, therefore, the opinion of this department that when the death of a township collector occurs during his term of office, his personal representative shall have charge of all books, accounts, money or other township personal property that were in the possession or under control of said collector at the time of his death. Such personal representative shall make final settlement of accounts of township funds for deceased to the county court within the same time and manner as the collector was required to do under the provisions of Section 139.420, RSMo 1949, except that the personal representative is not required to pay over tax funds in his hands to the county treasurer and ex-officio collector, and is also not required to make return of delinquent and unpaid taxes to the county court. He shall turn over possession and control of all such township books, accounts,

Mr. Leon McAnally

money or other personal property to the successor of the deceased collector, less any legal fees earned but unpaid during the term of said collector.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

FHC:DA

STATE FEDERAL SOLDIERS' HOME
OF MISSOURI:
APPLICANTS FOR ADMISSION:

: Persons may be admitted to the State
: Federal Soldiers' Home of Missouri who are
: citizens of Missouri and who were soldiers
: and sailors honorably discharged from the
: service of the United States who are in
: indigent circumstances, and who, from any
: disability not received in any illegal
: act are unable to support themselves by
: manual labor; the aged mother, wife or
: widow of such soldier or sailor; army
: nurses who served with the armies of the
: United States; and ex-members of the en-
: rolled Missouri Militia who served 90
: days or more in the field during the
: civil war.

April 7, 1955



Honorable Marvin H. McDaniel
Superintendent
State Federal Soldiers' Home
of Missouri
St. James, Missouri

Dear Mr. McDaniel:

This will be the opinion you requested from
this office for the construction of the meaning
of the terms of Section 212.140, RSMo 1949, re-
specting the eligibility of persons for admission
to the State Federal Soldiers' Home of Missouri.

Your request reads as follows:

"I wish to make reference to Missouri
Revised Statutes, 1949, Chapter 212,
Soldiers' Home, Section 212.140, Who
May Be Admitted.

"The Board of Trustees at their regu-
lar meeting on March 9th requested
that I communicate with you and re-
quest an opinion with regards to Sec-
tion 212.140 concerning a 90 days
service. The opinion requested is
should this be wartime service, ie,
an applicant desiring admission to
this Home having had more than 90
days wartime service with reference
to the above referred to Statute."

Section 212.140 defining the conditions and cir-
cumstances under which persons may be admitted into
said Home reads as follows:

"The soldiers and sailors who shall
be entitled to admission into said

Honorable Marvin H. McDaniel:

home shall be citizens of the state of Missouri, who were honorably discharged from the service of the United States, and who are in indigent circumstances, and from any disability, not received in any illegal act, are unable to support themselves by manual labor, and that the aged mother, wife or widow of such soldier or sailor, and army nurses, who served with the armies of the United States or such ex-members of the enrolled Missouri militia, who served ninety days or more in the field during the civil war, shall also be entitled to admission in said home, provided they be in indigent circumstances and unable to support themselves by manual labor."

It is apparent that it was the intention of the Legislature in enacting said Section 212.140 to classify, and the effect of the terms of said section is to group persons eligible to admission in said Home, into definite classes. First, the section names as a class the soldiers and sailors who shall be entitled to admission into said Home. They shall be citizens, the section states, of the State of Missouri, who were honorably discharged from the service of the United States, and who are in indigent circumstances, and who, from any disability not received in any illegal act, are unable to support themselves by manual labor. Second, the section defines, in the singular, but as another class, the aged mother, wife or widow of such soldier or sailor. Third, the section proceeds to define as a third class of persons eligible for admission to said Home, army nurses who served with the armies of the United States. And, fourth, such ex-members of the enrolled Missouri Militia who served ninety days or more in the field during the civil war, are also made eligible to admission to said Home; provided they, the persons named in the second, third and fourth classes be in indigent circumstances and unable to support themselves by manual labor. We believe the sentence in said section referring to the standard of eligibility of any of such classes of persons to be admitted to said Home as requiring ninety days or more

Honorable Marvin H. McDaniel:

service in the field during the civil war refers only to such ex-members of the enrolled Missouri Militia and does not refer to or include persons in any other groups as so classified.

The first class of such persons entitled to admission to said Home comprises soldiers and sailors who were honorably discharged from the service of the United States and who are in indigent circumstances and who, from any disability not received in any illegal act, are unable to support themselves by manual labor. Nothing whatever is said in the section regarding the period of their service. It would therefore, we believe, mean any service, in any department of the United States military service. We believe the section as it so defines that class could properly end there with a period, and a complete class of persons who are eligible for admission to said Home would be conclusively defined, and that by no reasonable construction could it be said that such persons in such class would be required to furnish proof that they, or any of them, served as a part of their service ninety days or more in the field during the civil war. We do not believe that the determination of the eligibility of that class of persons for admission to said Home depends upon such ninety days service, or the fact that a ninety day period of service in the field was complied with. There are countless numbers of persons who have been in the military service of the United States who were not in the field even during wartime but were assigned to and did serve the United States in other military capacities, such as ordnance department, training, transportation or hospitals, or other units of the service of the United States. Their eligibility for admission to the Home, if otherwise qualified, would not be affected thereby.

The second group or class of persons entitled to admission to said Soldiers' Home is defined in said section as the aged mother, wife, or widow of such soldier or sailor. Manifestly, no requirement of actual military service in any capacity or in any place would be required of such persons for admission into said Home. Such persons, to be eligible to admission, we believe, would have

Honorable Marvin H. McDaniel:

to be in indigent circumstances and unable to support themselves by manual labor. A reasonable construction of the terms of the section would be, we believe, that the aged mother without any other necessity than her age, or the wife or widow of such soldier or sailor, regardless of their respective ages, any of whom is in indigent circumstances and unable to support herself by manual labor would be eligible for admission to said Soldiers' Home. Certainly, the Legislature did not intend for the section to mean, nor does it mean, that any such person as an aged mother, or the wife or widow of a soldier or sailor who had been in the service of the United States would be required to show that they had served ninety days or any other period in the field.

Third, the section means, we believe, describing the third class of persons eligible to be admitted into said Home, that it comprises army nurses who served with the armies of the United States. We do not think, nor does any word or sentence in said section referring to this class indicate, that army nurses, in order to establish eligibility for admission to said Home, are required to show that they served ninety days or more, or any other period of time, in the field during the civil war. The military history of the United States shows that nurses did serve in the field, but they, too, in various numbers, also served in hospitals and convalescent institutions in which soldiers and sailors were inmates, and many of such nurses no doubt never performed any nursing services for the United States in the field.

Fourth, this fourth and last class of persons made eligible by said section for admission into said Home refers to and means such former members (ex-members) of the enrolled Missouri Militia as the persons who, to become eligible, are required to have served ninety days or more in the field during the civil war in their service for the United States, provided they be in indigent circumstances and unable to support themselves by manual labor. It should be noted that this requirement is also made of the first class of soldiers and sailors who have been in the military service of the United States and who have been honorably discharged. The same requirement

Honorable Marvin H. McDaniel:

as to being indigent and unable to support themselves by manual labor, we believe, appearing in the proviso at the end of the section, includes all persons in classes two, three and four as we have outlined them.

CONCLUSION

It is, therefore, the opinion of this office that:

- 1) Persons eligible to admission to the State Federal Soldiers' Home of Missouri are soldiers and sailors who are citizens of the State of Missouri who were honorably discharged from the service of the United States and who are in indigent circumstances, and from any disability not received in any illegal act are unable to support themselves by manual labor;
- 2) The aged mother, wife or widow of such soldier or sailor, if such persons are in indigent circumstances and are unable to support themselves by manual labor;
- 3) Army nurses who served with the armies of the United States, if indigent and unable to support themselves by manual labor; and
- 4) Ex-members of the enrolled Missouri Militia who served ninety days or more in the field during the civil war, provided they be in indigent circumstances and unable to support themselves by manual labor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON
Attorney General

GWC:irk

FEDERAL SOLDIERS' HOME: (Step-mother of ex-serviceman eligible
STEP-MOTHER OF EX-SERVICEMAN (for admission to Federal Soldiers' Home
INELIGIBLE FOR ADMISSION: (of Missouri, is not the aged mother of
(ex-serviceman within the meaning of
(Section 212.140 RSMo 1949, and is not
(eligible for admission into home.



June 15, 1955

Honorable Marvin H. McDaniel
Superintendent, State Federal
Soldiers' home of Missouri
St. James, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion, which reads as follows:

"I wish to request an opinion with reference to Section 212.140, Who May Be Admitted, of the Missouri Revised Statutes 1949.

"Kindly furnish this office with an opinion with reference to a stepmother being eligible for admission to this Home as a mother with reference to the above referred to Section."

Section 212.140 RSMo 1949 referred to above specifies the requirements for admission into the Federal Soldiers' Home of Missouri, and reads as follows:

"The soldiers and sailors who shall be entitled to admission into said home shall be citizens of the state of Missouri, who were honorably discharged from the service of the United States, and who are in indigent circumstances, and from any disability, not received in any illegal act, are unable to support themselves by manual labor, and that the aged mother, wife or widow of such soldier or sailor and army nurses, who served with the armies of the United States or such ex-members of the enrolled Missouri militia, who

Honorable Marvin H. McDaniel

served ninety days or more in the field during the civil war, shall also be entitled to admission in said home, provided they be in indigent circumstances and unable to support themselves by manual labor."

The inquiry calls for a construction of Section 212.140, supra, and particularly as to whether the step-mother of an ex-serviceman (qualified for admission) is eligible for admission into the home as the "aged mother" of such serviceman within the meaning of the word "mother", as used in the section.

One of the cardinal rules of statutory construction is that the statute must be construed in such a manner as to give effect to the intention of the lawmaker. If possible, the legislative intent and purpose must be ascertained from the language expressed in the statute, and said language and any terms used therein will be given their plain or ordinary meaning, unless from the context it appears that the legislative intent was to give them a technical meaning. These elementary rules of statutory construction were reaffirmed by the court in the case of State v. Hawk, 228 SW 2d 785. The court said at l. c. 788:

"* * * It is fundamental that in interpreting Sec. 10484, supra, our primary purpose is to ascertain and give effect to the intention of the legislature. If possible, the statutory intent, should be determined from the words which have been used 'considering the language honestly and faithfully to ascertain its plain and rational meaning and to promote its object and manifest purpose.' City of St. Louis v. Senter Commission Co. 337 Mo. 238, 85 S. W. 2d 21, 24. Artophone Corporation v. Coale, 345 Mo. 344, 133 S. W. 2d 343, 347; Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S.W. 2d 920, 925. Since no technical language is employed in the statute, the words used 'will be construed in their ordinary sense and with the meaning commonly attributed to them, unless such construction will defeat the manifest intent of the Legislature.' State ex rel. City of St. Louis v. Caulfield, 333 Mo. 270, 62 S. W. 2d 818, 822; State ex rel. Gass v. Gordon, 266 Mo. 394, 181 S. W. 1016, Ann. Cas. 1918B, 191."

Honorable Marvin H. McDaniel

There is no indication that the words "mother", or "aged mother" used in Section 212.140, supra, were intended to be given a technical meaning, hence, we shall assume that they have been used in their common or ordinary sense.

The word "mother" is ordinarily used when referring to the female parent of a child. Webster's New International Dictionary (2nd Edition) defines the words "step-mother" as: "The wife of one's father by a subsequent marriage." Black's Law Dictionary (4th Edition) defines "step-mother" as: "The wife of one's father by virtue of a marriage subsequent to that which the person spoken of is the off-spring."

A stepmother is not ordinarily spoken of or referred to as the mother of the step-child. We note that Section 212.140, supra, specifically refers to the mothers of ex-servicemen but makes no reference to the step-mother of said ex-servicemen. In the absence of any such reference, it is our thought that the Legislature did not intend to extend the common or ordinary meaning of the terms "mother" or "aged mother", as used therein to include a step-mother of an ex-serviceman. Therefore, it is believed that a step-mother is not an "aged Mother" within the meaning of the statute, and that she is not eligible for admission to the Federal Soldiers' Home of Missouri.

CONCLUSION

It is the opinion of this department that a woman who is a step-mother of a former ex-serviceman eligible for admission to the Federal Soldiers' Home of Missouri is not the "aged mother" of such serviceman within the meaning of Section 212.140 RSMo 1949, and is not entitled to be admitted into the home.

The foregoing opinion, which I hereby approve, was prepared by Assistant Paul N. Chitwood.

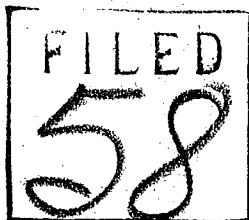
Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

PNC:ma

FEDERAL SOLDIERS' HOME:
DONATIONS:

The Board of Trustees of the State Federal Soldiers' Home of Missouri is authorized to accept gifts of money or property from any source, including inmates of the Home. That the approval of the Governor is not necessary in the matter of the acceptance of a gift for the Home by the trustees.



September 21, 1955

Honorable Marvin H. McDaniel
Superintendent
State Federal Soldiers' Home
St. James, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The Board of Trustees of this State institution requested I communicate with you and request you furnish us an official opinion relative to the Missouri Revised Statutes, 1949, Section 212.120, Board to hold and convey certain property - limitations.

"The Board of Trustees would like to know if it would be permissible for them to accept donations of money from members of this institution, and would it be necessary for them to have the approval of the Governor whenever a donation is received. At this particular time let us say the donation would be between \$100 and \$2,000.

"I want to thank you for your very prompt attention concerning our State Federal Soldiers' Home affairs in the past and the many courtesies shown this institution."

The only question contained in your above letter is whether it would be proper for the board of trustees to accept donations of money from "members of this institution," and whether it would be necessary to have the approval of the Governor when a donation is received. By the words "members of this institution," we can only assume that you mean inmates. We shall so consider the meaning to be.

Section 212.120 RSMo 1949, to which you refer, reads as follows:

Honorable Marvin H. McDaniel

"The board of trustees may receive any grant or devise of land, or any gift or bequest of money or other personal property to the Federal Soldiers' Home, at St. James, as an endowment of the Federal Soldiers' Home at St. James, thereby vesting title to any such property in the state of Missouri for the sole use and benefit of the home. The board of trustees may sell, convey, or otherwise convert into money any such property for the use and benefit of the home, however, any such sale, conveyance or conversion shall be first approved by the governor of the state of Missouri."

It seems plain to us from the above that the board of trustees may accept gifts of money to the Federal Soldiers' Home. The above section does not restrict the source of these gifts in any way, and it would, therefore, appear that any person, including an inmate of the Home, could make such a gift. From Section 212.120, supra, it appears equally clear that the approval of the Governor is not necessary for the acceptance of gifts by the board of trustees.

In 1949 this issue of the acceptance of gifts by the Board of Trustees of the Federal Soldiers' Home arose in the case of Mississippi Valley Trust Company v. Ruhland, 222 S.W.(2d) 750. In that case Rosa Ruhland, an individual residing in the City of St. Louis, by her last will and testament bequeathed a considerable sum of money to the "Federal Old Soldiers' Home, located at St. James, Missouri." Heirs of Rosa Ruhland sought to break the will making the above bequest, on the ground that the home was not permitted to accept such gifts. In regard to this matter the court, in its opinion, at l.c. 753, stated:

"Express statutory provisions contemplate the receipt of private gifts of money and property for the use of the Federal Soldiers' Home and refute the contention of the heirs that it may be maintained only by the appropriation of State funds therefor. Mo. R.S.A. Sec. 15137, supra, expressly requires the Trustees of said Home to periodically report under oath 'giving a detailed statement of all moneys and other property received on account of such home'; and requires said Trustees 'to immediately transmit to the state treasurer all moneys received by them, or by any financial officer of the institution, from whatsoever source, except (not material here), and the state treasurer shall * * * credit the same to the federal soldiers' home fund, which is hereby created and established.' (Emphasis ours.) This

Honorable Marvin H. McDaniel

harmonizes with Sec. 2 of the original act (Laws 1897, p. 29). The provision in said Sec. 2 of the original act that the Trustees' 'actual expenses incident to the care and maintenance and establishment of said home shall be borne by the state and be paid out of any moneys appropriated for its maintenance' is not to be tortured into a covenant by the State to reject gifts for the maintenance of said Home. The extent of the authority conferred upon the Trustees by the original act to covenant with respect to the acquisition of said Home was explicitly limited to receive the property 'for a nominal consideration.' Laws, 1897, p. 30, Sec. 3, Mo.R.S.A. Sec. 15138. Sections 9363 and 9366 likewise recognize the right of the State to accept gifts on behalf of said Home."

From the above it would appear that the board had the power to accept gifts from any source.

It is to be understood that in our holding regarding the issue here involved, we are not passing upon the propriety or public policy involved.

CONCLUSION

It is the opinion of this department that the Board of Trustees of the State Federal Soldiers' Home of Missouri is authorized to accept gifts of money or property from any source, including inmates of the home.

It is the further opinion of this department that the approval of the Governor is not necessary in the matter of the acceptance of a gift for the home by the trustees.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld

SCHOOLS: Where consolidated school district has voted bond issue with no specific location for construction of buildings having been submitted to voters and subsequently becomes part of enlarged district, board of enlarged district may locate site for construction of buildings anywhere within enlarged district.

SCHOOL DISTRICTS:



December 13, 1955

Honorable Leon McAnally
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. McAnally:

This is in response to your request for opinion dated October 31, 1955, which reads as follows:

"I would like the opinion of your office based on set of facts following, and on which we have previously exchanged correspondence:

"As I understand it the Hornersville Consolidated School District voted a \$125,000.00 bond issue for erection of gymnasium and classroom facilities. The bonds have been sold. No specific location for same was ever mentioned nor none selected. At this time there is under consideration a proposal to re-organize the school districts in south end of the county whereby, if approved by the voters, the present Hornersville School District would no longer exist as is, but would become a part of a Re-organized School District along with three other school districts.

"The opinion of your office is desired on the question as to whether the Re-organized District through its board, of course, could take this bond money and build the said gymnasium and classroom facilities anywhere in the new Reorganized District, even though it might be located beyond the limits of the present Hornersville School District."

Honorable Leon McAnally

It has been held by the Supreme Court on numerous occasions that in the submission of a bond issue for the construction of a school building it is not necessary to specify the place at which the building is to be built. Parenthetically, we might state that if the site of the proposed building is included in the proposition voted upon it becomes part of the purpose of the loan and must be complied with (See opinion of Attorney General to Albert L. Hencke, September 30, 1954, copy enclosed).

Here, however, no specific location for the proposed construction of the gymnasium and classroom facilities was mentioned. In a similar situation the Supreme Court said, in *Hart et al. v. Board of Education of Nevada et al.*, 299 Mo. 36, 252 SW 441, 442:

"Under the statutes of this state (sections 11127, 11134, and 11135, R.S. 1919), the school boards, and they alone, are intrusted with the duty of providing and maintaining school facilities, including sites, school-houses, and furnishings. The methods and means to be employed in the discharge of these functions are committed wholly to their judgment and discretion. It is unnecessary therefore for them to submit to the electorate the question as to whether, under a given situation, they shall increase the housing facilities of the school district by erecting one new building, or more than one, or the question as to where such building or buildings shall be located. The only thing that they are required to go to the taxpayer for is authority to borrow money (or to increase the tax rate). * * *"

Again, in *State ex rel. Whitehead et al. v. Wenom*, 326 Mo. 352, 32 SW2d 59, 62, the court said:

"As to the location of the school site, there can be no question but that it is left to the discretion of the school board in consolidated districts. In common school districts it is to be determined by the voters. Section 11210, Rev. St. 1919. Consolidated school districts are governed by the laws applicable to the government of town and city districts (section 11257, Rev. St. 1919), and it has been correctly held by this

Honorable Leon McAnally

court that in town and city districts the statute vests in the directors 'full and complete discretion as to the location of the school houses.' State ex rel. v. Jones, 155 Mo. 570, 576, 56 S.W. 307, 309. See also Hart et al. v. Board of Education of Nevada Sch. Dist., 299 Mo. 36, 252 S.W. 441; Velton v. School Dist., 222 Mo. App. 997, 6 S.W. (2d) 652. * * *

The conclusion, then, from these cases is that at the present time the Board of Directors of Hornersville Consolidated School District has the authority to determine the location of the building for which the \$125,000 bond issue was voted.

Section 165.690, RSMo 1949, provides that where a plan of reorganization is adopted and the board of directors organized, the treasurer of a six-director district which becomes part of an enlarged district shall turn over all funds belonging to such former component district to the treasurer of the enlarged district. That section reads as follows:

"The terms of office of all school directors and officers of the various school districts comprising the territory incorporated in such enlarged school districts shall cease upon the adoption of the plan of reorganization and the organization of the board of directors, and such officers shall deliver to the board of directors of the enlarged school district all property, records, books and papers belonging to such component districts. All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the treasurer of such enlarged district. If any former six-director district shall be merged in any enlarged district, as provided herein, the treasurer of such former six-director district shall immediately turn over to the treasurer of such enlarged district, all funds belonging to such former six-director district, and shall make settlement therefor as provided by section 165.350; provided,

Honorable Leon McAnally

that the directors of such enlarged district shall faithfully perform all existing contracts and legal obligations of the component districts."

Upon completion of the reorganization and the formation of the enlarged district, Hornersville Consolidated District would cease to exist and the property and funds formerly belonging to it and the other component districts would thereupon become the property of the enlarged district. By the same token, its obligations, including this \$125,000 bond issue, would become the obligation of the new enlarged district (See opinion of Attorney General to William F. Brown, April 27, 1950, copy enclosed).

It is further provided in Section 165.687, RSMo 1949, that the directors of an enlarged district shall be governed by the laws applicable to six-director districts. This, of course, includes Section 165.317, RSMo 1949, vesting the government and control of the district in the board, and Section 165.370, RSMo 1949, authorizing the board to select the site for school buildings. In *Velton et al. v. School Dist. of Slater*, 222 Mo. App. 997, 6 SW2d 652, 654, the Kansas City Court of Appeals said:

" * * * The statute, section 11241, R.S. 1919, permits the directors of a school district such as the one involved here, to locate and change the location of school and school-houses in said district and gives them authority to sell school property no longer intended for the use of the district. When the bonds were voted the voters knew of the right of the board to change the location of schools in the district and were not deceived."

See also *Gladney v. Gibson*, 208 Mo. App. 70, 233 SW 271; *Crow v. Consolidated School Dist. No. 7*, 36 SW2d 676 (Springfield Court of Appeals); *State ex rel. Miller v. Board of Education of Consolidated School Dist. No. 1 of Holt County*, 224 Mo. App. 120, 21 SW2d 645 (Kansas City Court of Appeals); *State ex rel. Gehrig v. Medley*, 28 SW2d 1040 (Springfield Court of Appeals).

Since upon the adoption of this plan of reorganization the Hornersville District would cease to exist as such and the area now comprising such district would become a part of the enlarged

Honorable Leon McAnally

district, and since the enlarged district upon its formation would become obligated for this bond issue, we are of the opinion that the board of directors of the enlarged district would have control of these funds the same as if the bond issue had originally been voted by the enlarged district and could locate the site for the construction of the proposed gymnasium and classrooms anywhere within the enlarged district.

CONCLUSION

It is the opinion of this office that if Hornersville Consolidated School District, wherein a bond issue of \$125,000 has been voted for the purpose of construction of a gymnasium and classroom facilities with no specific location for the construction of such buildings having been mentioned in the submission of the issue to the voters, should by the adoption of a plan of reorganization become part of an enlarged district, the board of directors of the enlarged district would have the authority in the exercise of its discretion to select a site for the construction of such gymnasium and classrooms anywhere within the area of the enlarged district.

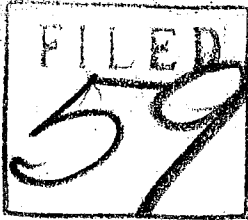
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (2)

CRIMINAL LAW:: When a defendant voluntarily appears to answer a
ARREST: : charge that he has committed a misdemeanor, and
SUMMONS: : does not object to the failure of issuance of a
WARRANTS: : warrant of arrest or summons against him, it is
: unnecessary to then issue as a matter of course
: such warrant of arrest or summons.
.....



March 30, 1955

Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Mr. McGhee:

Your letter of March 25, 1955, requesting an
opinion of this office reads, in part, as follows:

"This office handles a large volume of
minor misdemeanors, the majority of
which can be classified as follows:

"1. Conservation commission regulation
violations.

"2. Minor traffic violations.

"In most of these cases either the con-
servation agent in the former case, or
the sheriff or highway patrolman in the
latter, give the violator a summons to
appear before the magistrate court on a
day certain to answer the charge, which
is subsequently filed by me.

"As I understand the matter, this 'sum-
mons', not being issued by the court
pursuant to the Supreme Court rule, has
no legal validity, but is merely a 're-
minder' to appear as directed or a war-
rant will be issued.

"When the violator does appear in re-
sponse to such 'summons' should a warrant
be issued or not?

"The magistrate here has taken the position
that the violator, by his appearance, has

Honorable Roy W. McGhee, Jr.:

waived the issuance of the warrant, while I am informed that in other counties a warrant is issued in all such cases as a matter of course."

Supreme Court Rule 21.05 provides:

"Upon the filing of an information charging the commission of a misdemeanor, a warrant for the arrest of the defendant shall be issued. If, however, there is reasonable ground, in the discretion of the judge, magistrate or the prosecuting attorney, as the case may be, to believe that the defendant will appear upon a summons, a summons shall be issued instead of a warrant of arrest. The summons shall describe the offense charged in the information and shall command the defendant to appear at a stated time and place in answer thereto. The summons may be served in the same manner as a summons in a civil action. If the defendant shall fail to appear as commanded by the summons, a warrant of arrest shall be issued."

The obvious intent of the Supreme Court in formulating the above rule was to obviate the necessity of the issuance and execution of an arrest warrant in misdemeanor cases wherein there is reasonable ground to believe that the defendant will appear voluntarily to answer the charge against him. Since a warrant of arrest need issue only when the defendant fails to appear in response to a summons, it is clear that such warrant is not required to be issued as a matter of course when a defendant voluntarily appears at a time and place satisfactory to the court having jurisdiction of the case. Nor is it necessary for the court to issue a summons to a defendant who voluntarily appears without objection to the failure of issuance of a summons by the court. The summons is nothing more than notice to the defendant that he has been charged with an offense, and that he is required to appear at a certain time and place to answer the charge. See Form No. 22, Criminal Procedure Forms Promulgated by the Supreme Court of Missouri, p. 789, RSMo Cumulative Supplement, 1953. The purpose of the summons having been fulfilled upon

Honorable Roy W. McGhee, Jr.:

the voluntary appearance of the defendant, it is our opinion that no summons need be then issued. Our position is substantiated by 22 C.J.S., Criminal Law, paragraph 316, p. 468, which declares the rule to be:

"* * * However, since the only function of the warrant in a criminal case is to enable the court to acquire jurisdiction of the person of accused by bringing him before the court to answer the charge made against him, where a person is arrested lawfully, without a warrant, and is immediately taken before the court, or when accused appears voluntarily and pleads to the complaint, or when his presence is secured in some other way, there is no necessity for a warrant. * * *."

CONCLUSION

It is, therefore, the opinion of this office that when a defendant voluntarily appears to answer a charge that he has committed a misdemeanor, and does not object to the failure of issuance of a warrant of arrest or summons against him, it is unnecessary to then issue as a matter of course such warrant of arrest or summons.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:irk

CROP FOREST LANDS:
FORESTRY:
TAXATION:

Person whose land has been classified as forest cropland may withdraw his land from such classification by paying the taxes owed thereon plus penalty equivalent to 5% interest less the amounts previously paid.



May 9, 1955

Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Mr. McGhee:

You recently requested an opinion from this office wherein you asked the following questions concerning the withdrawal of forest cropland from such classification:

"1. Should the owner first notify the commission or the district forester, or merely pay the taxes due?

"2. What taxes are due? If the land in question has been under the forest cropland program over 5 years are taxes which are for years preceding the last 5 legally collectible? If the assessor has never kept books for the separate assessment, may the collector take the assessed valuation for the year prior to the time the land was included in the forest cropland program and, using that valuation, figure the taxes due for all the years subsequent, during which the land was under the forest cropland program? If this be correct, does the collector then merely add 5 % penalty, and deduct the \$1.00 per acre paid, and omit the usual penalties? How is the 2¢ @ acre paid by the State accounted for?"

In answer to the first question which you asked, the statute, Section 254.220, RSMo. 1949, provides that when the owner has paid the back taxes due on such land it is automatically dropped from the forest cropland class. Thus there is no statutory requirement of notification but when the back taxes due etc., have been paid the land automatically ceases to have its classification of forest cropland.

Hon. Roy W. McGhee, Jr.

As to questions asked in the second paragraph of your request, the taxes due are those specified in Section 254.220, supra. They are the back taxes for each year during which the land was classified as forest cropland plus a penalty equivalent to 5% interest on such amount less the taxes actually paid on the basis of the assessment of the land in question at the rate of \$1.00 per acre as provided in Section 254.090, RSMo 1949.

There would be no question about the collectibility of taxes for a year more than five years in the past. It is assumed that your question was based upon the possible application of the statute of limitations, however, these taxes were not due as long as the land was classified as forest cropland and therefore the statute of limitations would not start to run. These taxes only become due and payable at the time the land is withdrawn from the classification of forest cropland and, therefore, the statute of limitations would begin to run at the time of such withdrawal.

It is, by Section 254.220, RSMo. 1949, made the duty of the assessor, county clerk and collector to keep all records of all taxes due as if the land were not classified as forest cropland. Thus, in effect, the statutes provide for two assessments; one under Section 254.090, RSMo 1949, of \$1.00 per acre and the other representing the balance of the valuation that would have been applicable if the land had not been classified as forest cropland. Since you point out that your county officials failed to keep records, as required, of the assessment and taxes due on the balance remaining after the application of Section 254.090, this land should, for such purposes, properly be considered as omitted land and the assessor should place it on his book before the same is returned to the county court with all arrearages of tax for former years charged thereon pursuant to the provisions of Section 137.165, RSMo 1949, which provides for the assessment of omitted real estate.

As to the two cent per acre paid to the county by the state the statutes provide nothing about reimbursement of this amount when land is voluntarily withdrawn from its classification as forest cropland. Thus the officials of the county need not concern themselves with this item. It is only when classification as forest cropland is canceled by the commission that the owner of such land is required to make reimbursement of this two cents per acre paid by the state to the county. Such reimbursement is made to the Director of Revenue as is provided by Section 254.210 RSMo 1949, and since your question refers to voluntary withdrawal that section is not applicable.

Hon. Roy W. McGhee, Jr.

CONCLUSION

It is, therefore, the conclusion of this office that under the provisions of Section 254.220, RSMo. 1949, one who desires to withdraw his land from its classification as forest cropland does so by paying the taxes due thereon for the years during which such land was so classified; that no other notification is required and that the amount due is the amount of tax that would have been levied on such land during each and all of the years wherein the land was classified as cropland plus a penalty equal to 5% interest on such amount less the amount of taxes actually paid thereon under the provisions of Section 254.090, RSMo. 1949.

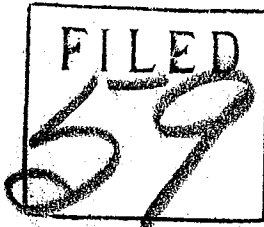
The foregoing opinion which I hereby approve, was prepared by my assistant, Mr. Fred L. Howard.

Yours very truly,

John M. Dalton
Attorney General

FLH:mw

WORKMEN'S COMPENSATION: Fairfax Community Hospital, an incor-
CORPORATIONS: porated, non-profit, charitable institu-
CHARITABLE CORPORATIONS: tion is an "employer" within terms of
Missouri's Workmen's Compensation Law.



August 26, 1955

Honorable Fred R. McMahon
Member, Missouri House of Representatives
Atchison County
Fairfax, Missouri

Dear Mr. McMahon:

This opinion is in answer to your recent inquiry
which may be summarized as follows:

The Fairfax Community Hospital
is an incorporated, non-profit
organization now employing about
fifty people. Query: Is such
hospital compelled to carry work-
men's compensation insurance on
such employees?

For the purpose of this opinion we assume that Fairfax
Community Hospital is a non-profit, charitable organization.
Section 287.280, RSMo 1949, of Missouri's Workmen's Compen-
sation Law, provides, in part, as follows:

"Every employer electing to accept
the provisions of this chapter, shall
insure his entire liability thereunder
except as hereafter provided, with some
insurance carrier authorized to insure
such liability in this state, except
that an employer may himself carry the
whole or any part of such liability
without insurance upon satisfying the
commission of his ability so to do.

* * *

Honorable Fred R. McMahon

The applicability of the Workmen's Compensation Law to charitable institutions was before the St. Louis Court of Appeals in the case of Hope v. Barnes Hospital, 55 S.W. (2d) 319, 227 Mo. App. 1055, and the Court spoke as follows at 227 Mo. App. 1.c. 1062:

"Furthermore, it is significant that the definition of the term 'employer' in Section 3304, Revised Statutes 1929 (12 Mo. St. Ann., sec. 3304, p. 8238), is so comprehensive as to include within its scope an institution such as the employer herein; and there is nothing about the act as a whole which discloses a legislative purpose to have limited its application solely to industries and businesses within the ordinary sense of the word. Indeed, the Legislature in framing the act had many opportunities to have exempted charitable institutions from its operation if it had chosen to have done so, and the fact that no such exception was created warrants the fair assumption that it was the legislative intent to have brought such institutions within the act."

Section 3304, R.S. Mo. 1929, referred to in the above quotation from Hope v. Barnes Hospital, supra, remains unchanged at this date in Section 287.030, RSMo 1949.

CONCLUSION

It is the opinion of this office that Fairfax Community Hospital, an incorporated, non-profit, charitable institution is an "employer" as such term is defined in Section 287.030, RSMo 1949, of the Workmen's Compensation Law of Missouri, and is amenable to Section 287.280, RSMo 1949, requiring an employer under said Act to carry insurance on its employees.

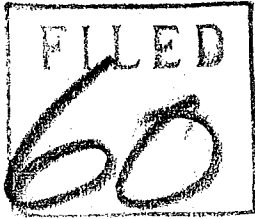
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO:M:gm

COUNTY COURTS: County court may not obligate county by
designating in December, 1954, newspaper
COUNTY FINANCIAL REPORTS: in which county's financial report is to
be published after January 1, 1955.



February 3, 1955

Honorable Charles W. Medley
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

We have received your request for an opinion of this
office, which request is as follows:

"A situation has arisen in St. Francois
County and the County Court has requested
that I write you for an attorney general's
opinion and I respectfully request the
same.

"The facts are as follows:

"Section 50.800 R.S.M. 1949 provides that
on or before the first Monday in March of
each year after the taking effect of this
law the county court of each county in
this state shall prepare and publish in
some newspaper of general circulation
published in such county, if such there
be, and if not be notices posted in at
least ten places in such county, a de-
tailed financial statement of the county
for the year ending December thirty-first,
preceding.

"Pursuant to this statute, the then County
Court, entered an order on the 9th day of
December, 1954, authorizing the Farmington
News, a weekly newspaper in this county to
publish the financial statement for the
year 1954, and they also authorized Harold
Thomas, the then county clerk to prepare
this financial statement.

Honorable Charles W. Medley

"On January 1, 1955, a new County Court took office, having been elected at the general election in November, 1954.

"On January 24, 1955, the new County Court discovered that this order had been made authorizing the Farmington News to publish the financial statement for 1954 and the new Court was of the opinion that some other newspaper in the county would be able to render the county better service in the publication of the financial statement and they notified the Farmington News.

"The Farmington News had allegedly expended \$500.00 in partially preparing the financial statement for publication.

"QUESTION No. 1: Would the County Court as of December, 1954, have a right to designate a newspaper to publish the financial statement in 1955 for the year 1954?

"QUESTION No. 2: Would the present County Court which took office as of January 1, 1955, be bound by the old Court's order as to who should publish the financial statement?

"QUESTION No. 3: Assuming the new Court authorizes a different newspaper to publish the financial statement, would the County be liable to the Farmington News for a breach of contract or for any other liability?

"Would appreciate a very prompt reply as this financial statement must be published by the 1st Monday in March of 1955."

Section 50.800, RSMo 1949, provides, in part, as follows:

"1. On or before the first Monday in March of each year after the taking effect of this law the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such

Honorable Charles W. Medley

county, a detailed financial statement of the county for the year ending December thirty-first, preceding."

Section 50.810, RSMo 1949, provides, in part, as follows:

"1. The statement shall be set in the standard column width measure that will take the least space and the publisher shall file two proofs of publication with the county court and the court shall forward one proof to the state auditor and shall file the other in the office of the court. The county court shall not pay the publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the state auditor shall have notified the court that said proof of publication has been received and that it complies with the requirements of this section."

Section 50.800 obviously contemplates that publication of the financial statement will be made between January 1 and the first Monday in March of each year. Publication prior to January 1 would be impossible inasmuch as the county's financial condition as of the end of the year could not possibly be ascertained prior to that date.

Under Section 50.810 no expenditure of county funds for the publication may be made until after proof of the publication has been filed by the court and the report as published has been approved by the State Auditor.

In view of the foregoing provisions, we think it clear that no expenditure of county funds for the publication of the report may be made until sometime after January 1 of each year. As a result, we feel that the question of the authority of a county court to designate a newspaper for publication of the report must be considered in the light of the county budget law.

Section 50.670, RSMo 1949, applicable to counties of the third class, the class to which St. Francois County belongs, provides, in part, as follows:

Honorable Charles W. Medley

" * * * The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January first, and ending December thirty-first. * * *"

Under this provision the expenditures for the publication of the 1954 financial statement must be included in the budget for 1955, inasmuch as the Legislature has clearly evidenced the intention that the county's fiscal affairs shall be conducted on a calendar year basis.

In view of the foregoing, we feel that a county court would have no authority to incur any liability on behalf of the county for publication of the report prior to the year for which the item is required to be budgeted. The courts have held on numerous occasions that under the county budget law the county may be obligated for an expenditure, even though for county purposes, only when there has been provision made in the county budget for such expenditure and only when there is an unexpended balance in the fund to which the expenditure must be charged. *Missouri-Kansas Chemical Corporation v. New Madrid County*, 345 Mo. 1167, 139 S.W. (2d) 457; *Elkins-Swyers Office Equipment Co. v. Moniteau County*, 357 Mo. 448, 209 S.W. (2d) 127.

The wisdom of such requirement seems to us apparent. To permit an outgoing county court to enter into contracts to be paid out of the subsequent year's budget could possibly result in a complete upsetting of a county's financial system.

In reaching the above conclusion we have taken into consideration the case of *Aslin v. Stoddard County*, 341 Mo. 138, 106 S.W. (2d) 472. In that case an outgoing county court on December 31 of the last year of the terms of two of its members entered into a contract with a janitor for the county courthouse for a period beginning on January 1. The incoming county court refused to recognize the contract and the janitor sued for breach of his contract. The county contended that the county court could not enter into a contract extending beyond the term of office of some of its members. The court rejected this contention, stating, 106 S.W. (2d) 1.c. 477:

Honorable Charles W. Medley

" * * * In our opinion, a county court has power to make a contract such as that here in question, for a reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold."

The Aslin case, however, involved the transaction entered into prior to the enactment of the county budget law. Its provisions were not applicable and, therefore, were not considered by the court.

We have also considered the case of State ex rel. Taylor v. Wade, 360 Mo. 895, 231 S.W. (2d) 179. In that case the court held that the failure of the county court to include in the county budget provision for expenditure for publication of the annual financial report was no defense to an action in mandamus to compel publication of such report. The court stated in that case with reference to the annual financial statement, 231 S.W. (2d) 1.c. 183:

" * * * So here, while the Legislature did not fix the exact amount to be included in the budget, its direction in these statutes that such a statement must be prepared and published annually is a mandate to the county court to include a reasonable amount for that purpose in each year's budget; and the amounts required for this purpose 'have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred.'"

However, we feel that the decision in that case affords no excuse to a county court for failing to comply with the county budget act and include in its budget provision for the cost of publication of the county's annual financial report. In the Wade case the county court sought to excuse its failure to perform a mandatory duty on the grounds that it had failed to perform another duty likewise imposed upon it by law.

As for the question of liability of the county to the newspaper previously designated by the county court, in view of the fact that the outgoing county court had no authority to contract for the publication, no liability could be imposed upon the county to the newspaper originally designated. In the case of Bayless v. Gibbs, 251 Mo. 492, 1.c. 506, 158 S.W. 590, the court stated:

Honorable Charles W. Medley

"This court, in numerous cases, has repeatedly held, that the county courts of the respective counties of the State are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void.

"Consequently, this court has also repeatedly held, that all persons while dealing with said courts or agents are bound to take notice of their powers and authority." (Emphasis ours.)

There is also another matter to be considered in this connection. You have informed us that the county court made no written contract with the Farmington News but merely designated it by order entered of record as the newspaper in which publication was to be made. In this connection we call your attention to Section 432.070, RSMo 1949, which provides:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

If the order of the county court is the only writing relative to the purported contract, it is obvious that under this section it would be void because it had not been "subscribed by the parties thereto." The courts have held on numerous occasions that contracts entered into by counties and other political subdivisions contrary to the provisions of this section are void. *Missouri-Kansas Chemical Co. v. Christian County*, 352 Mo. 1087, 180 S.W. (2d) 735.

Honorable Charles W. Medley

If there is no written contract, the fact that the Farmington News had expended \$500.00 in preparing to publish the report would not extend to that newspaper the benefit of Section 431.090, RSMo 1949. That section provides:

"The county court may, by an order entered of record, appoint an agent to make any contract on behalf of such county for erecting any county buildings, or for any other purpose authorized by law; and the contract of such agent, duly executed on behalf of such county, shall bind such county if pursuant to law and such order of court."

In the case of Missouri-Kansas Chemical Co. v. Christian County, supra, the court explained the effect of this section in cases where no written contract had been entered into as follows, 180 S.W. (2d) 736:

"This court has held that this section applies only where the parties have not followed the required form of procedure in executing a contract and that it affords no relief where the parties have failed to follow the conditions imposed upon the making of a contract. Scott v. St. Louis County, 341 Mo. 1084, 111 S.W. 2d 186; Hillside Security Co. v. Minter et al., 300 Mo. 380, 254 S.W. 188."

CONCLUSION

Therefore, it is the opinion of this office that:

- (1) The county court as of December, 1954, has no authority to obligate the county by designating a newspaper to publish the annual financial report of the county for the year 1954, which publication must be made sometime after January 1, 1955;
- (2) That the county court which took office as of January 1, 1955, would not be bound by the old court's order as to who should publish the financial statement;
- (3) That should the new court enter into a contract with a different newspaper to publish the financial statement, the county

Honorable Charles W. Medley

would not be liable to the newspaper previously attempted to be designated for publication by the county court in 1954 for a breach of contract or for any other liability, particularly where no written contract signed by the parties has been entered into for such publication.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

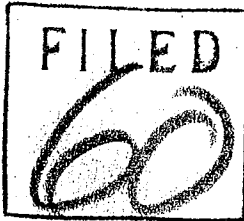
Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

TAXATION:

COUNTY BOARDS OF EQUALIZATION: County boards of equalization not authorized to employ appraisers.



March 24, 1955

Honorable Charles W. Medley
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"The County Court has requested that I write you for an opinion on the following subject:

"Does the Board of Equalization in a third class county have the power to hire appraisers to appraise real estate within the county for the purpose of determining whether or not the present appraised valuations are fair?"

Section 138.010, RSMo 1949, provides, in part, as follows:

"1. In every county in this state, except as otherwise provided by law, there shall be a county board of equalization consisting of the judges of the county court, the county assessor, the county surveyor, and the county clerk who shall be secretary of the board without vote."

Section 138.030, RSMo 1949, provides, in part, as follows:

"2. Said board shall have the power and the duty to hear complaints and to equalize the valuation and assessments upon all taxable real and tangible personal property within the county so that all such property shall be entered on the tax book at its true

Honorable Charles W. Medley

value; provided, that said board shall not reduce the valuation of the real or tangible personal property of the county below the value thereof as fixed by the state tax commission."

Section 138.040, RSMo 1949, provides, in part, as follows:

"1. The county board of equalization shall have power to compel the attendance of witnesses and the production of necessary papers and records in relation to any appeal before them, and it shall be the duty of the sheriff of the county to execute such process as may be issued to this end."

Other provisions of Chapter 138, RSMo 1949, relating to county boards of equalization, confer no authority upon the boards to employ appraisers in connection with the exercise of their functions. We find no other statutory provision for such employment. The question then arises as to whether or not such authority may be implied in the county boards of equalization. The county board of equalization, being a creature of statute, has only such powers as are committed to it by statute. State ex rel. Davis v. Walden, 332 Mo. 680, 60 S. W. (2d) 24. The board has such implied authority as is necessary to accomplish the grant of power conferred upon it. In re Sanford, 236 Mo. 665, 1. c. 692. It does not appear to us that the employment of appraisers is necessary to enable the board of equalization to accomplish the purpose for which it is established. This appears to us particularly to be true in view of the authority conferred upon the board by Section 138.040, supra, to compel the attendance of witnesses and the production of necessary papers and records. This authority appears to us to be sufficiently broad, particularly in view of the fact that it may be enforced by contempt citation (In re Sanford, supra), that the employment of persons to make studies and investigations on behalf of the board is not a power necessary to enable the board to carry out its functions.

CONCLUSION

Therefore, it is the opinion of this office that the board of equalization in a third class county does not have the authority to hire appraisers to appraise real estate within the county for the purpose of determining whether or not assessed valuations are fair.

Honorable Charles W. Medley

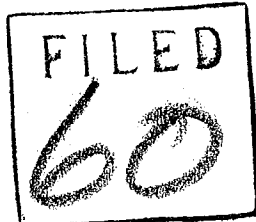
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml,da

SCHOOLS: In third class cities of less than ten
SCHOOL DISTRICTS: thousand population, may have separate
ELECTIONS: polling places for school election and
municipal election.



April 7, 1955

*See op
32, March 10, 1958
to Gornholz.*

Honorable Charles W. Medley
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Medley:

This is in response to your request for an opinion dated February 23, 1955, which reads, in part, as follows:

"Could you please give me an attorney general's opinion on the following question:

"Is it legal to have separate polling places for school elections and city elections both held on the same day in April in a third class city?"

This question could only arise if the school district in question was either a city or town district. Hence, your question concerns an interpretation of Section 165.330, MoRS, Cum. Supp. 1953, the pertinent portion of which reads as follows:

"1. The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at six o'clock a.m. and closing at seven o'clock p.m. of said day. * * *

"2. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by

Honorable Charles W. Medley

the secretary of the board; provided, that in all cities and towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants, said elections may at the option of the board be held at the same time and places as the election for municipal officers with the judges and clerks of such municipal election serving as judges and clerks of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose.

"3. * * * provided, that if there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town and said school election shall be conducted within the limits of such other incorporated city or town in the same manner as hereinbefore provided for cities or towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants."

You have informed us by telephone that the city of the third class, about which you inquire, has a population of less than ten thousand and that, therefore, there is no question with regard to registration of voters.

The above section was construed in the case of *Armantrout v. Bohon*, 162 S.W. (2d) 867. In that case only one polling place was established for the city of Hannibal in a school election at which a county superintendent was being elected. In refuting the contention that the board of education had abused its discretion in not establishing more polling places for the city of Hannibal the court said, 1.c. 871:

"As we understand it, the appellant does not contend that any mandatory law, constitutional or statutory, was violated and we are unable to find any such violation from her allegations. The quoted statute (Sec. 10483, R.S. Mo. 1939, Mo. R.S.A. Sec. 10483) says the voting shall be 'at such convenient place or places * * * as the

Honorable Charles W. Medley

board may designate.' It may 'at the option of the board' be held at the same time and place as city elections are held in certain counties. But none of these provisions may be construed as mandatory. It does not appear that any city elections were being conducted at the time. There are times conceivably, when one voting place in Hannibal would be adequate for the submission of school matters to the voters of the district, although we doubt that to be the case when there is contest over the office of county superintendent. But even so, we cannot say that the board's designation of only one voting place in that district was a violation of any mandatory provision of the law, even though it did not provide places easily accessible and convenient to the voters. The board may not have used the best judgment in selecting voting places but that only one place was designated, in this instance and under the circumstances, is not such an abuse of their discretion, or disregard of the election laws that the election may be invalidated for this reason. 18 Am. Jur., Sec. 113, p. 251; Kerlin v. Devils Lake, 25 N.D. 207, 141 N.W. 756, Ann. Cas. 1915C, 648. * * *

Section 165.330, supra, vests the board of education of a school district with the discretion of designating the polling places for the annual school election and provides that at the option of the board such election may in cities and towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants be held at the same time and places as the election for municipal officers. There is, however, no mandatory requirement that the polling places in such cities be the same for municipal elections as for school elections. Therefore, we deem it clear that it is legal to have separate polling places for school elections and city elections both held on the same day in April in a third class city having a population of less than ten thousand.

CONCLUSION

It is the opinion of this office that the board of education of a school district may designate polling places in the annual

Honorable Charles W. Medley

school election separate and apart from the polling places established for the election of municipal officers in cities of the third class having a population of less than ten thousand.

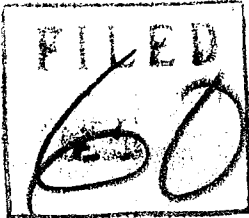
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

SHERIFFS:
JAILERS:
COUNTY COURT:



(1) Circuit judge may authorize sheriff in counties of the third class to appoint a jailer to be paid from county funds; (2) the compensation of such jailer should not be included in the board bill for prisoners submitted to the county court, but should be shown as a separate item of expense; (3) Circuit court has no authority to authorize the sheriff to employ a cook; (4) The expense of cook hire may be paid by the county if such is reasonably incurred by the sheriff in boarding prisoners and should be included in the monthly board bill submitted by sheriff to county court.

May 12, 1955

Honorable Charles W. Medley
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"The Sheriff in our county and the County Court have been having some difficulty over some of the sheriff's expenses and they have requested that I write you asking for an attorney generals opinion.

"The facts are as follows. In March of this year the sheriff presented a bill to the County Court for payment and this bill included \$75.00 for a jailer, \$50.00 for a cook for the jail. Both of these items were separate from the prisoners board bill. The sheriff has not secured a court order authorizing the appointment of either a jailer or a cook. St. Francois County is a third class county. Based on the following facts could you please give me an opinion on the following questions:

"1. Would the County be authorized to reimburse the sheriff for either of these items as they have been presented?

"2. Would it be legal for the Circuit Judge to authorize the sheriff to appoint a jailer to be paid from county funds?

Honorable Charles W. Medley

"3. Would it be proper for the sheriff to include in the board bill for his prisoners the cost of a jailer?

"4. Would it be legal for the Circuit Judge to authorize the sheriff to employ a cook to be paid for from county funds?

"5. Would the county be authorized to pay for a cook if such item was included in the board bill for the prisoners?

"6. Would the county be authorized to pay for a cook that was not included in the county board bill?

* * * * *

The provisions of our statutes governing the boarding and feeding of prisoners, when confined in the county jail of a county of the third class, are found in Chapter 221, RSMo 1949. Section 221.090 provides as follows:

"1. In each county of the third or fourth class, the sheriff shall furnish wholesome food to each prisoner confined in the county jail. At the end of each month, he shall submit to the county court a statement supported by his affidavit, of the actual cost incurred by him in the boarding of prisoners, together with the names of the prisoners, and the number of days each spent in jail. The county court shall audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary cost.

* * * * *

The statute requires the sheriff to furnish wholesome food to each prisoner confined in the county jail, and to submit to the county court, at the end of each month, a statement, supported by his affidavit, of the actual cost incurred by him in the boarding of such prisoner, together with the names of said prisoners and the number of days each spent in jail. Said section further directs the county court to audit said statement to determine the actual and necessary cost and draw a warrant on the county treasury payable to the sheriff.

Honorable Charles W. Medley

The preparation of food is, without question, a necessary adjunct to the duty imposed on the sheriff of furnishing wholesome food to prisoners, and if the sheriff undertakes, as the circumstances may require, to have the food prepared rather than obtaining the food already prepared and ready for serving, then we are of the opinion that the employment of a cook would be an actual and necessary cost incurred by the sheriff in discharging the aforementioned duty, and that such expense should be included in the monthly statement submitted to the county court. A more complete discussion relating to the duty of the sheriff in furnishing food to prisoners is contained in an opinion to D. R. Jennings, Prosecuting Attorney, Montgomery County, under date of March 10, 1952, a copy of which is enclosed herewith for your information.

Therefore, it is our opinion, assuming the necessity of a cook, that the county court would be authorized to pay for cook hire, if such item was included in the board bill for prisoners, since such would constitute an actual expense to the sheriff in furnishing food to such prisoners. Since it is made the duty of the sheriff to furnish food to prisoners, and since there is no other statutory provision authorizing the county to employ a cook to prepare food, we are further of the opinion that the county would not be authorized to pay for cook hire separate and apart from the board bill submitted by the sheriff, whether authorized by the circuit court or not, a matter for which we find no authority.

Section 221.020 provides that the sheriff shall act as jailer, and further provides that said officer may appoint a jailer under him. Said section more fully provides as follows:

"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible."

We are unable to find any provision in Chapter 221 granting compensation to a person hired as jailer; however, your attention is directed to Section 57.250, RSMo 1949, which provides as follows:

"The sheriff in counties of the third and fourth classes shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court,

Honorable Charles W. Medley

as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered of record and a certified copy thereof shall be filed in the office of the county clerk. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment."

The latter-noted section provides the sheriff may, upon order and approval of the circuit court, appoint deputies and assistants. Said section further provides that the judge of the circuit court shall fix the compensation of such deputies or assistants. We are of the opinion that a jailer, appointed by order and approval of the circuit court, would be an assistant as contemplated in Section 57.250, and that the compensation as fixed would be a proper charge against the county. Absent such court order, however, we are of the opinion that the county court would not be authorized to expend county funds for the payment of a person appointed as jailer. In this regard, see the case of Alexander vs. Stoddard County, 210 S.W.2d 107, 1.c. 109, wherein the court said:

" * * * 'As a general rule compensation for services rendered by assistants, deputies, and other employees can be allowed directly to them or to their superiors only as authorized by law; and where no provision is made for the payment, or for the appointment or employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement. * * * '"

Honorable Charles W. Medley

We are unable to see any relation between a jailer acting as such and the boarding of prisoners, and are of the opinion that the sheriff should not include the expenses of a jailer in the board bill submitted to the county court. Fees or reimbursement may be allowed to an official only as provided by statute, and such statutes are construed strictly against the officer. See Nodaway County vs. Kidder, 129 S.W.2d 857.

CONCLUSION

Therefore, it is the opinion of this office that the circuit court may authorize a sheriff of a county of the third class to appoint a jailer, and that the compensation of such person, as fixed by the circuit court, should be billed to the county as a separate item and not included in the board bill for prisoners required to be submitted to the county court by the sheriff.

We are further of the opinion that a county of the third class would be authorized to pay for cook hire, if such expense is reasonably incurred by the sheriff in furnishing food to the prisoners confined in the county jail, and that such expense should be included in the monthly board bill submitted by the sheriff to the county court, since there exists no authority for the appointment of a cook in connection with the feeding of county prisoners or the incurring of such expense by the county, other than as may be incident to the duties of the sheriff.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

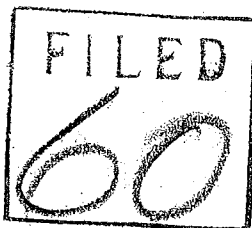
John M. Dalton
Attorney General

DDG/vtl

Enclosure: 3-10-52 to D.R.Jennings

KIDNAPPING:

Parent forcibly taking its child against will of person to whose custody child has been awarded by decree of court of competent jurisdiction is guilty of kidnapping under Sec. 559.240, RSMo 1949.



August 29, 1955

Honorable Charles W. Medley
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

The following opinion is rendered in reply to your inquiry reading as follows:

"Could you please give me your opinion based on the following facts.

"On the 22nd day of September, 1952, the City Court of Aurora, Illinois, entered an order declaring that a minor child by the name of Sandra Lee Jump, was a neglected child and that Cora Wann be given temporary custody. This order was never changed and on May 26, 1955, Sandra Lee was living with Cora Wann here in St. Francois County when Sandra Lee's mother, Charlene Shyvers, picked the child up off of the street and forced her into an automobile and drove away to Spokane, Washington.

"Based on these facts could you tell me whether or not Charlene Shyvers is guilty of kidnapping.

"I have checked with the clerk in the City Court of Aurora, Illinois, and he has advised me that their City Court has concurrent jurisdiction with the Circuit Court, however, I have not verified this fact."

Honorable Charles W. Medley

Section 559.240, RSMo 1949 provides:

"1. If any person shall, willfully and without lawful authority, forcibly seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be sent or taken out of this state, or to be secretly confined within the same against his will, or shall forcibly carry or send such person out of this state against his will, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years.

"2. Any person charged with such offense may be tried in any county into or through which the person so seized, inveigled, decoyed or kidnaped shall have been taken, carried or brought."

For the purpose of this opinion we will assume that the temporary custody of Sandra Lee Jump was lawfully awarded to Cora Wann, and that the order giving such custody was in full force and effect at the time the child was forcibly taken by her mother.

No decision of our Missouri courts deciding this question has been discovered. The following statement of the law is found in 31 Am. Jur., Kidnapping, Sec. 6:

"* * * a parent, or one assisting such parent, commits the crime of kidnapping by taking a child from another to whom its custody has been awarded by a decree of the court."

At 51 C.J.S., Kidnapping, Sec. 4, we find the following rule stated:

"The offense of kidnapping a child cannot be committed by the person having the right to the custody of such child, such as the father or the mother, or the guardian of a child. On the other hand, the crime may be committed if a parent takes his child without the consent and against the will of a person to whose custody the child has been committed by the decree of a court of competent jurisdiction."

Honorable Charles W. Medley

In the case of State v. Huhn, 142 S.W. (2d) 1064, 1.c. 1067, the Supreme Court of Missouri spoke as follows:

"Although we have no decision on the point involved in this State, the rule is established throughout the United States that where the father and mother ^aare equally entitled to the custody of their minor child the father does not commit the crime of kidnapping by taking exclusive possession of it. State v. Elliott, 171 La. 306, 131 So. 28, 77 A.L.R. 314; Hard v. Splain, 45 App. D.C. 1; Commonwealth v. Myers, 146 Pa. 24, 23 A. 164; Hunt v. Hunt, 94 Ga. 257, 21 S.E. 515; State v. Angel, 42 Kan. 216, 21 P. 1075; State v. Powe, 107 Miss. 770, 66 So. 207, L.R.A. 1915B, 189. Where the custody has been established by the decree of a competent court or by statute, the rule is otherwise. See Annotations in 32 L.R.A., N.S., 845 and 77 A.L.R. 317."
(Emphasis supplied)

CONCLUSION

It is the opinion of this office that the crime of kidnapping defined by Section 559.240, RSMo 1949, is committed by a parent who forcibly takes his child against the will of a person to whose custody the child has been committed by the decree of a court of competent jurisdiction.

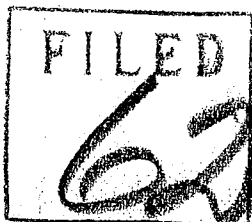
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

JLO:M:gm

COUNTY HIGHWAYS: The county court of Marion County, Missouri, may
CITIES: legally authorize expenditures and expend county funds,
COUNTY COURTS: within certain defined limits, for the purpose of construction, repair, improvement and upkeep of the streets of an incorporated municipality within the county boundaries, when such street forms part of a continuous highway of said county leading through the city or village; that a street, to form a part of a continuous highway of the county, must be a connecting link between two portions of a highway, which together form an uninterrupted line of traffic; that it is necessary that such street be a continuation of a county highway, and that it extend through and beyond the aforesaid city or village; that if a highway end at the city limits of a city or village, or if the city limit is the Mississippi River, a state line or a county line, money cannot be spent as aforesaid on the improvement of the aforesaid city street.



January 10, 1955

Honorable Harry J. Mitchell
Prosecuting Attorney
Marion County
Palmyra, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The County Court of Marion County, Missouri desires your opinion in regard to the legal questions hereinafter set forth. Would you please inform me as to your opinion in this matter, and I will pass the information on to the County Court.

"QUESTION: Can the County Court of Marion County, Missouri, legally authorize expenditures and expend County funds for the purpose of construction, repair, improvement, and upkeep of the streets of an incorporated municipality within the County boundaries?

"(a) When the street forms part of a continuous highway of said County, leading through the City or Village?

"(b) When the street does not form a part of a continuous highway of said County leading through the City or Village?

"If your opinion as to the above leaves the following questions relevant, would you also please answer them?

Honorable Harry J. Mitchell

"QUESTION: What is a street which forms a part of a continuous highway of the County? Is it necessary that the street be a continuation of a County Highway at the entrance to the City Limits, extend through the City and exit as a continuation of a County Highway? How does the fact that the City Limit is the Mississippi River, a State line, or a County line, affect your answer to the last question, if that answer is yes?

"For your convenience, I will give you the following citations which I found by a hurried and not thorough research. Article X, Section 12 (a) Constitution of the State of Missouri, 1945; Missouri Revised Statutes 1949, Section 137.555; Missouri Digest, Counties Key Number 1532; the State ex rel. Town of Kirkwood v. County Court of St. Louis County, 142, Missouri 575, 44 S. W. 734; Constitution of Missouri 1945, Article III, Section 38 (a); Constitution of Missouri 1945 Article VI Section 23; Constitution of Missouri 1945 Article VI Section 25.

"It seems to me that since the Constitution of 1945, the case of the town of Kirkwood, *infra*, is no longer authority."

In regard to your first question, I call your attention to an opinion, a copy of which is enclosed, rendered by this department on April 9, 1949, to Honorable E. Wayne Collinson, Prosecuting Attorney of Greene County. This opinion, I believe, fully answers your first question, to the effect that a county court may expend funds in the amount, and from the source, set forth in the opinion, on the upkeep and improvement of a city street when such street forms a part of a continuous highway of such county leading through the city or village.

In answer to your second question we again refer you to the Collinson opinion. It is based upon Section 8527, Laws Mo. 1945, p. 1478, now Sec. 137.555 RSMo 1949, which section is quoted on page 2 of the aforesaid opinion. That section states that there may be such expenditures "if said street shall form a part of a continuous highway of said county leading through such city or village."

Honorable Harry J. Mitchell

The above words are adopted as part of the conclusion in the Collinson opinion.

It would appear that the above language is perfectly plain and clear. We note that the word "continuous" when used as legal phraseology has no different meaning than when commonly used.

In the case of *Hode v. Sanford*, 101 Fed. (2d) 290, the word is defined as "without break, cessation or interruption."

In the case of *Talbot v. Acheson*, 110 Fed. Supp. 182, the word "continuous" is defined as meaning "connected, extended or prolonged without separation or without interruption of sequence * * *."

Many other definitions of this word could be given, but all are of the same import, and it appears to be unnecessary to do so.

As we stated before, the statute (Section 8527, Laws Mo. 1945, p. 1478, Section 137.555 RSMo 1949) states that "* * * a part of a continuous highway of said county leading through such city or village * * *." The word "through" does not mean "to" or "into" a city or village. If a city limit is the Mississippi River (as is the case of Hannibal, Missouri) it is also, of course, a state line so far as cities bordering on the Mississippi River are concerned.

Clearly, no money could be spent by a county in another state, even though a river were not the dividing line. We feel that the same would be true if the city limit were a county line. It seems to us that the legislature used the word "through" with the consideration in mind of such a situation as you present to us. The primary purpose of the legislature, we believe, was to establish a county road system, not to develop a city street for the benefit of the city. Therefore, when a city street is not a part of a county road, as it would not be when the road did not go on "through" the city, the legislative purpose would cease to exist.

We do not believe that the case of *Town of Kirkwood v. County Court of St. Louis County*, cited by you, is applicable in the instant situation.

CONCLUSION

It is the opinion of this department that the County Court of Marion County, Missouri, may legally authorize expenditures and expend county funds, within certain defined limits, for the purpose

Honorable Harry J. Mitchell

of construction, repair, improvement and upkeep of the streets of an incorporated municipality within the county boundaries, when such street forms part of a continuous highway of said county leading through the city or village; that a street, to form a part of a continuous highway of the county, must be a connecting link between two portions of a highway which together form an uninterrupted line of travel; that it is necessary that such street be a continuation of a county highway and that it extend through and beyond the aforesaid city or village; that if a highway ends at the city limits of a city or village, or if the city limit is the Mississippi River and a state line or a county line, that money cannot be spent as aforesaid on the improvement of the aforesaid city street.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW:ld:da

Enclosure
4-9-49 to E. Wayne Collinson

DEEDS: COUNTY RECORDER: Deputy recorder of deeds may be made assignee for purpose of releasing notes by mortgage or deed of trusts.



May 25, 1955

Honorable Garner L. Moody
Prosecuting Attorney
Wright County
Hartville, Missouri

Dear Sir:

We are in receipt of your request for an opinion which reads:

"Would you please issued an opinion on the release of Deeds of Trust in regard to who may sign as assignee. When a note secured by a deed of trust is mailed to the Recorder of Deeds to be released, has he a right to have his Deputy sign as assignee and then attest the release himself?"

Under Section 443.060, RSMo 1949, the Legislature has clearly provided what persons are qualified to make such releases, and furthermore provides that it is mandatory they do so when requested and at the cost of the one making such request. Such persons are designated as any mortgagee, cestui que trust or assignee, or administrator of a mortgagee, cestui que trust or assignee. Said statute read, in part:

"1. If any mortgagee, cestue que trust or assignee, or administrator of the mortgagee, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the

Hon. Garner L. Moody

margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided."

We believe from reading your request what you are anxious to know is what is the proper procedure for releasing a note secured by a mortgage or deed of trust, when the note is signed in blank for the purpose of release and mailed to the county recorder in order that he may release same of record.

The circuit clerk and county recorder in such counties of fourth class may appoint deputies to be approved by the circuit court, who shall take the same oath as their principal, possess the same qualifications, and be authorized to perform the same duties in the name of their principal, who is responsible for their actions. Section 59.300, RSMo 1949. Furthermore, under Section 59.150, RSMo 1949, the recorder is authorized to administer oaths to any person in matters relating to the duties of his office. Such authority is likewise vested in the deputy recorder.

Since the official duties of the recorder and his deputy are the same, with like authority and responsibility, to permit one to be assignee on a note even for mere release of record, and the other to attest the release, is closely tantamount to the recorder performing both acts.

We are familiar with the general practice in making such releases. By mailing same for release, it avoids the necessity of having to personally deliver it to the recorder of deeds. Upon receipt of the same, the general practice with most recorders is to have anyone that may be available in the courthouse sign as assignee, except his deputy. In this manner no one can possibly criticize him for such action, and it is not too difficult to have someone act as assignee only for this purpose. We are not unmindful that occasionally the practice has been to require the deputy recorder to sign as assignee and the recorder attest same. There

Hon. Garner L. Moody

is no statutory inhibition against such practice. Furthermore, said note may be endorsed in blank. Section 401.009, Missouri Revised Statutes, 1949, see also Volume 10, Corpus Juris Secundum, Section 212, Page 697.

While such proposed procedure may be subject to criticism, strictly speaking, it cannot be considered against public policy and in the absence of some statutory inhibition against said practice, we are obliged to hold that it is not illegal to permit the deputy recorder to act as assignee in such case. However, we recommend the better practice to be to have someone else sign as assignee.

CONCLUSION

Therefore, it is the opinion of this department that when a note secured by a mortgage or deed of trust is mailed to the recorder of deeds in such county to be released, the deputy recorder of deeds may be made assignee for that purpose, however, it is recommended the better practice to be for someone else to sign as assignee.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:vlw:mw

COUNTIES UNDER TOWNSHIP
ORGANIZATION:
COUNTY TREASURER AND EX-
OFFICIO COLLECTOR'S FEES:

In determining maximum amount to be re-
tained by county treasurer in counties of
the third and fourth class under township
organization, all taxes, including current
real and personal, are to be considered in
determining bracket under Sec. 52.260, RSMo
1949.



March 2, 1955

Honorable M. E. Morris
Director of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"This department respectfully requests an
official opinion from your office on the
following question:

"Under Sections 52.260 and 52.270, R. S.
Mo., 1949, we would like to be advised
whether or not the current real and the
current personal taxes assessed and levied
in each county should be used in determin-
ing the sub-section that applies to the
maximum fees and commissions which may be
retained by the ex-officio collector in
counties under township organization, or
does Section 54.320 Laws of Missouri,
1951 supersede Sections 52.260 and 52.270
R.S. Mo., 1949 and therefore eliminate any
provisions for a maximum amount to be re-
tained by the ex-officio collector in
counties under township organization."

Section 54.320, Mo.RS, Cum. Supp., 1953, reads as follows:

"The county treasurer in counties of the
third and fourth classes adopting town-
ship organization shall be allowed a sal-
ary of not less than one hundred dollars
per month by the county court to be paid
as at present provided by law; the ex of-
ficio collector for collecting and paying
over the same shall be allowed a commis-
sion of three per cent on all corporation

Honorable M. E. Morris

taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes; he shall receive nothing for paying over money to his successor in office."

It will be observed that such official collects only corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, insofar as the commission of such official is paid by the state and its political subdivisions. Commissions on delinquent taxes are taxed under the statute against such delinquents and paid by them.

The problem which you have presented arises by virtue of Section 52.270, RSMo 1949, relating to the determination of the compensation to be allowed collectors. This statute provides in part as follows:

"* * * provided, however, that this section shall not apply to any county adopting township organization, so far as concerns the rate of per cent to be charged for collecting taxes, but shall apply to counties under township organization so far as to limit the total amount of fees and commissions which may be retained annually by the county treasurer and ex officio collector for collecting taxes in such counties; * * * * *" (Emphasis ours)

It will be observed that this portion of the statute does not refer to township collectors inasmuch as commissions of such officials are fixed under the provisions of Subsection 4, of Section 139.430, RSMo 1949.

The provisions of Section 52.270, RSMo 1949, by their terms incorporate into such statute, for the purpose of determining maximum commissions which may be retained, the brackets established under Section 52.260, RSMo 1949. The latter statute consisting of fourteen separate brackets, based upon total taxes assessed in the various counties, provides in part as follows:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except

Honorable M. E. Morris

back taxes, the following commissions and no more:

"(1) In each county in this state wherein the whole state, county, bridge, road, school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year amount to five thousand dollars or less, a commission of ten per cent on the amount collected;

* * * * *

The brackets are in each instance determined by the " * * whole state, county, bridge, road, school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year * * * "

It will be noted that at no place in the statutory scheme for determining the maximum commissions allowed to collectors of revenue in any county does there appear any provisions eliminating any taxes from the total amount used in determining the maximum amount of such commissions nor the brackets applicable to such county. In other words, in determining the bracket used for fixing the maximum of such commissions to be retained, no legislative regard has been given to the fact that in counties under township organization the township collectors collect the current real and personal taxes and the county treasurer, as ex officio collector, is required to collect the corporation taxes, back taxes, licenses, merchants' tax, tax on railroads and delinquent taxes. In the absence of such exclusion, we are constrained to the belief that the whole of the taxes are to be used in determining the proper bracket.

CONCLUSION

In the premises, we are of the opinion that in determining the maximum collector's commissions which may be retained by a county treasurer as ex officio collector in a county of the third or fourth class under township organization, the whole of the state, county, bridge, road, school and all other local taxes, including merchants' and dramshop licenses, which have been assessed and levied for the current year, are to be considered in determining the appropriate bracket provided by Section 52.260, RSMo 1949, to be used together with Section 52.270, RSMo 1949, in fixing the maximum commissions allowed such officer.

Honorable M. E. Morris

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:DA

MOTOR VEHICLE SAFETY
RESPONSIBILITY ACT:



Director of Revenue shall suspend license and registration of persons failing to satisfy judgments arising from motor vehicle accidents subsequent to the effective date of an Act found in Laws of Missouri, 1945, page 1207.

June 13, 1955

Honorable M. E. Morris
Director of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Morris:

Reference is made to your request for an official opinion of this department reading as follows:

"In the administration of the Safety Responsibility Law for the past seventeen months, this office has frequently been requested to suspend the operation and registration privileges and all licenses evidencing these privileges of a judgment debtor who is involved in an accident prior to August 29th, 1953, the effective date of the present Safety Responsibility Law.

"In the first instant, the judgment became final and the statutory period of thirty days under the old Law had elapsed. (See Section 4(A) of the enclosed pamphlet.) In the second instant, the judgment became final prior to August 29th, 1953, but the statutory period of thirty days as provided in Section 4(A) referred to above had not elapsed. A third situation arises where a request is made to suspend the operation and registration privileges and all licenses evidencing such privileges of a judgment debtor who was involved in an accident prior to August 29th, 1953, but who had not had a judgment secured against him until after the effective date of August 29th, 1953.

"In the first instance, the judgment could have been certified to the old Financial Responsibility Unit as it was then comprised and action would have been taken to suspend the judgment debtor's operation and registration privileges. In the second case,

Honorable M. E. Morris

the old Financial Responsibility Unit would have refused to suspend the judgment debtor because the statutory time had not elapsed.

"Due to the confusion which tends to arise in the above three instances, we respectfully request the opinion of the Attorney General as to whether or not the present Safety Responsibility Law gives the Director of Revenue the authority to suspend the operation and registration privileges and all licenses evidencing these privileges of the judgment debtor in each of the three situations in view of Section 303.360 of the Safety Responsibility Law as enacted in 1953."

Section 303.360, MoRS Cum. Supp. 1953, referred to in the above request, is as follows:

"303.360. Not to operate retrospectively.--1.
Sections 303.010 to 303.370 shall not be construed so as to deprive any person of any rights which may have accrued before the effective date of this law, or as conferring any rights upon any person whose claim for relief arose prior to the effective date of this law, nor as preventing the plaintiff in any civil action from relying for relief upon other process provided by law."

After reading the context of the foregoing statute, it is believed that the first question that arises is as to just what significance may be given to a head-note or catch word. In the case of Southwestern Bell Telephone Co. vs. Drainage Dist. No. 5, 247 S.W. 494, at l.c. 495, Judge Farrington of the Springfield Court of Appeals stated for the Court:

" * * * The headnote of the compiler of section 10739 is not a part of the law and in no way binding. See State v. Maurer, 255 Mo. 152, 164 S.W. 551, Ann. Cas. 1915C, 178. * * *."

Honorable M. E. Morris

The Maurer case mentioned supra, is even more descriptive as to the headnote's significance. At l.c., Mo., 160, Judge Robert Franklin Walker expressed the attitude of the Missouri Supreme Court in regard to headnotes or catch phrases, as follows:

"I. The headings of chapters, articles or sections are not to be considered in construing our statutes; these indicia are mere arbitrary designations inserted for convenience of reference by clerks or revisers, who have no legislative authority, and are, therefore, powerless to lessen or expand the letter or meaning of the law. * * *."

In accordance with the premise that the headnote or catch words to a statute do not constitute a part of a portion of the effective law it must be concluded that the noted quote, supra, "Not to operate retrospectively" means absolutely nothing. So far as the operation of the law is concerned, the words defining the time of operation and effect of the law should be found in the context. "Rights" as the term is used in Section 303.360, does not clearly and distinctively enough describe anything concerned with the administration of Chapter 303 (Section 303.360), MoRS Cum. Supp. 1953, to establish any limit whatsoever. It is believed that this law has been examined thoroughly since its passage as House Bill No. 19 and its effective date August 29, 1953. It is felt that it cannot be considered as bestowing any rights upon anyone as the word "rights" is commonly used. A license to operate a motor vehicle on the streets and highways is not a grant of an inalienable right. In Reitz vs. Mealey, 314 U.S. 33, 86 L. Ed. 21, Mr. Justice Roberts said, l.c. U.S. 37:

"If the statute went no further, we are clear that it would constitute a valid exercise of the state's police power not inconsistent with § 17 of the bankruptcy act. The penalty which § 94-b imposes for injury due to careless driving is not for the protection of the creditor merely but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows. * * *."

The gist of the opinion in the above case is that a state law to keep irresponsible drivers off the highway is

Honorable M. E. Morris

in the interest of public policy. Any rights accruing to anyone being, so far as the law is concerned, merely incidental. The section primarily involved in this opinion is Section 303.090, MoRS Cum. Supp. 1953. The pertinent part of that section is Subsection 1, which reads as follows:

"1. Whenever any person fails within sixty days to satisfy any final judgment in amounts and upon a cause of action as herein stated, it shall be the duty of the clerk of the court, or of the judge of a court which has no clerk, in which any such judgment is rendered within this state, to forward to the director immediately after the expiration of said sixty days, a certified copy of such judgment."

In the enactment of Chapter 303 in the above mentioned House Bill No. 19, the former law was specifically repealed. The repealed section was originally enacted in Laws of Missouri, 1945, page 1207, l.c. 1210. Section 4(a), which is quoted here for comparison, is as follows:

"Section 4. Commissioner to suspend license when any person fails to satisfy final judgment--not applicable, when.--(a) The commissioner also shall suspend the license and all registration certificates or cards and registration plates issued to any person upon receiving authenticated report, as hereinafter provided, that such person has failed for a period of 30 days to satisfy any final judgment in amounts and upon a cause of action as hereinafter stated."

Although not couched in the same language, no substantial difference can be found in the legal meaning of the two sections. The only exception is that the current statute has made the time of the report to the Director sixty days, where the former gave a thirty days period. It might be stated here that there is no substantial difference in the legal significance of the definition of the word "judgment" between the two sections. Upon the original enactment of the former law in 1945, the following provision was contained therein as Section 35:

"Section 35. Not retroactive.--This act shall not have a retroactive effect and shall not

Honorable M. E. Morris

app apply to any judgment or cause of action arising out of an accident occurring prior to the effective date of this act."

This section, however, was repealed by Senate Revision Bill No. 1112 of the 65th General Assembly. It is no longer the law. The general rule as to a repealed statute, it is believed, was concisely stated in State ex rel. Wayne County et al. vs. George E. Hackman, State Auditor, 272 Mo. 600, 1.c. 607, where the Court said:

"As a general rule, a statute expressly repealed is thereby abrogated and all proceedings commenced thereunder which have not been consummated are rendered nugatory unless the repealing act is modified by a saving clause. * * *."

It is believed that the major question involved here is best answered by Section 1.120, RSMo 1949, which is as follows:

"The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments."

In Brown vs. Marshall, 241 Mo. 707, 145 S.W. 810, 1.c. Mo. 728, the Court said:

"But independent of that, there is another sound rule of statutory construction which governs this case, and that is, a subsequent act of the Legislature repealing and reenacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. * * *."

Certainly, the effect of the law should not be destroyed by the repeal and re-enactment as has occurred here. It is believed that the proper interpretation is that on a judgment obtained prior to the effective date of the present law upon which there has been no certification by the clerk or court

Honorable M. E. Morris

as directed, should not be certified until sixty days after rendition in the event no appeal or stay is in effect. On any judgment occurring subsequent to the effective date of the 1945 Act, the Director must suspend, upon receiving proper notice given sixty days after the judgment. The sixty days is the time limit given to a debtor in which to satisfy an outstanding judgment prior to notice to the Director and appears to be the only limitation set up in the statute. It must be noted that it is not attempted herein to determine the effect of the law in regard to a judgment obtained prior to the effective date of the above quoted 1945 statute.

CONCLUSION

It is, therefore, the opinion of this office that the Director of Revenue shall suspend the motor vehicle operator's license and motor vehicle registration and any non-resident operating privileges upon receipt from the clerk or judge of any magistrate or circuit court, an unsatisfied judgment arising from the operation of a motor vehicle, provided such judgment is unsatisfied for sixty days or over.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. James W. Faris.

Very truly yours,

JOHN M. DALTON
Attorney General

JWF:lrk:gm

MOTOR VEHICLES:
DRIVER'S LICENSES:
CHAUFFEURS' LICENSES:
OPERATORS' LICENSES:

The Director of Revenue is authorized to report out-of-state convictions on the back of renewed operator's and chauffeur's licenses in the same manner in which convictions in Missouri are reported.



August 16, 1955

Honorable M. E. Morris
Director of Revenue
Department of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Morris:

Your request for an opinion reads as follows:

✓ It has been the practice of our Driver's License Unit to record out-of-state convictions on the back of renewed Operator's and Chauffeurs' licenses in the same manner in which convictions in Missouri courts are recorded.

"Our authority to do this has been questioned and we would appreciate your opinion as to our legal duty or authority in this connection."

Section 302.181, MoRS, Cum. Supp. 1953, reads, in part, as follows:

"1. The chauffeur's license and motor vehicle operator's license issued under the provisions of this chapter shall be in such form as the director shall prescribe. The expiration date thereof shall be printed or stamped in conspicuous letters and figures on the face of all licenses. The license shall not be valid unless signed by the applicant with pen and ink or unless it shall bear a photostatic copy or exact facsimile of his signature. The director shall inscribe on each license regularly renewed a complete memorandum of each conviction

uniform
See
1/ Below

RSMo

was W.
Hon. M. E. Morris

as shown by the records of his office or on the expiring license which have been had against the licensee during the twelve months' period next preceding the issuance of such renewal license. Space shall be provided on said license for brief notations which shall be made by or at the direction of judicial officers of all violations of state motor vehicle traffic laws or county or municipal traffic ordinances."

The important sentence in this paragraph which this office is of the opinion gives the Director the power to note out-of-state convictions on the back of a renewed chauffeur's license and operator's license is: "The director shall inscribe on each license regularly renewed a complete memorandum of each conviction as shown by the records of his office or on the expiring license which have been had against the licensee during the (twelve) months' period next preceding the issuance of such renewal license." (Emphasis ours.)

Thus, if any out-of-state convictions are in the records of the Director's office, they must be noted on the back of a renewed operator's and chauffeur's license, and if the expiring license contains noted out-of-state convictions on its back which have been had against the licensee during the twelve months' period next preceding the issuance of such renewal license, they too must be noted on the back of the renewed license.

Also, Section 302.120, RSMo 1949, in part, states as follows:

"2. The director of revenue shall also file all accident reports and abstracts of court records of convictions received by him under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of such licensee and the traffic accidents in which he has been involved shall be readily ascertainable and available for the consideration of the director upon any application for renewal of license and at other suitable times."

Hon M. E. Morris

Thus, this part of the above section empowers the Director to keep records of out-of-state convictions, for it states that he shall maintain convenient records of convictions received by him under the laws of this state. One of the laws of this state is Section 302.160, RSMo. 1949, which provides:

"The director of revenue is authorized to suspend or revoke the license of any resident of this state upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of an operator or chauffeur."

Since this last section authorizes the Director to receive notice of convictions of persons in another state, paragraph 2 of Section 302.120 requires the Director to record such conviction and keep records thereof, and since Section 302.181, Mo. RS Cum. Supp. 1953, requires the Director to inscribe on each license regularly renewed a complete memorandum of each conviction as shown by the records of his office, the Director is authorized to note on the back of a renewed operator's or chauffeur's license out-of-state convictions.

CONCLUSION

It is the opinion of this office that the Director of Revenue is authorized by law to record out-of-state convictions on the back of renewed operator's and chauffeur's licenses.

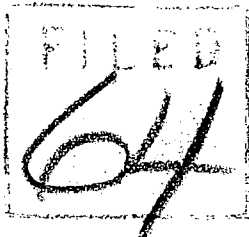
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Harold L. Volkmer.

Yours very truly,

John M. Dalton
Attorney General

HLV:ml:mw

CRIMINAL LAW: Under the provisions of Section 559.350, RSMo. Cum. Supp. 1953, a man may be charged and convicted for failure to support his children born out of wedlock notwithstanding the fact that he does not have the legal right to the care and custody of said child or children, and that paternity as an element of the offense, may be established in such criminal proceedings.



August 29, 1955

Honorable J. P. Morgan
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Morgan:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"As Prosecuting Attorney I am continually requested by the local Office of the Welfare Department at the apparent insistence of their State Headquarters to file criminal charges against alleged fathers for the support of their purported children.

"I would appreciate your opinion on the following question:

"1. What provision is made, if any, in the criminal laws of the State of Missouri relative to establishing the paternity of a child and what is the proper charge to file?"

We understand your question, in the broad sense, to be: "May a man be charged, convicted and punished for failure to support an illegitimate child."

Your attention is directed to Section 559.350, RSMo. Cum. Supp. 1953, which provides:

"If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his wife; or if any man or woman shall, without good cause, abandon or desert or shall without good cause fail, neglect or refuse to

Honorable J. P. Morgan

provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person, not the father or mother, having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide adequate food, clothing, lodging, medical or surgical attention for such child, whether or not, in either such case such child or children, by reason of such failure, neglect or refusal, shall actually suffer physical or material want or destitution; or if any man shall leave the state of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children in the state of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children with adequate food, clothing, lodging, medical or surgical attention, then such person shall be deemed guilty of a misdemeanor; and it shall be no defense to such charge that the father does not have the care and custody of the child or children or that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children, and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action." (Underscoring ours.)

This section is identical with Section 559.350, as contained in the 1949 revision, with the exception of the underscored portions. The underscored portions were added in 1953, House Bill 309, Laws 1953, page 424. The legislative history of said section, prior to the 1953 amendment, insofar as it might be related to the question at hand, may be found in the cases of, State ex rel. Canfield vs. Porterfield, 222 Mo. App. 553, 292 S.W. 85, and State vs. White, 248 S.W. 2d. 841.

In the case of State vs. White, 248 S.W.2d. 841, the Supreme

Honorable J. P. Morgan

Court had before it for determination on the then existing statute the precise question here involved. The defendant was charged under the provisions of Section 559.350, RSMo. 1949, with failure to support his alleged child born out of wedlock. In holding that the defendant could not be convicted under said section, absent a showing that defendant had the legal care and custody of said child, the court said:

"Strict construction of criminal statutes is a fundamental principle of our law. 'Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication.' State v. Bartley, 304 Mo. 58, 263 S. W. 95, 96. See also State v. Lloyd, 320 Mo. 236, 7 S. W. 2d. 344; State v. Taylor, 345 Mo. 325, 133 S.W. 2d. 336; State v. Dougherty, 358 Mo. 734, 216 S.W.2d. 467; Tiffany v. National Bank of Missouri, 18 Wall. 409, 85 U.S. 409, 21 L.Ed. 862. A defendant should not be held to have committed a crime by any act which is not plainly made an offense by the statute. The question here is: Has the legal duty to support an illegitimate child been imposed upon its father? As pointed out in the Canfield case, there is no other statute which has changed the common law rule and specifically imposed upon the father of an illegitimate child the legal duty to support it. Certainly, Section 559.350 does not specifically do so. Therefore, we do not think that Section 559.350, a criminal statute, can be reasonably construed as creating this legal duty especially in view of the words 'any other person having the legal care or custody of such minor child'. As said in the Canfield case, 'The use of the words "or any other person," etc., in these sections, which statutes must be strictly construed, shows that the words apply to persons who are charged with the care and custody of the child whether it be a parent or other person so charged.' Furthermore, we have no statutory bastardy proceedings, as some states do, to determine paternity and establish liability for support. However, see

Honorable J. P. Morgan

100.J.S., Bastards, Sec. 20, p. 96. For a thorough discussion of the situation throughout the country see Ploscowe--Sex and the Law, Chap. IV, Illegitimacy.

" 'The rule is universally adopted that a mother is the natural guardian of her bastard child, and, as such, has a legal right to its custody, care, and control superior to the right of the father or any other person unless it is otherwise expressly provided by statute.' 7 Am. Jur. 668, Sec. 61. See also 10 C.J.S., Bastards, Sec. 17. 'The duty of the mother to support her bastard child seems to be inferred as an incident to her right to its custody.' 10 C.J.S., Bastards, Sec. 18, p. 85. See also 7 Am. Jur. 673, Sec. 68 and Sec. 71. Likewise, as shown by these authorities, the mother is entitled to the child's services and earnings and may recover their value from a third person who employs the child. Under Section 468.060 only the mother may inherit from her illegitimate children and they may inherit only from her. Section 559.350 must be construed in the light of this historical background and we hold that its construction must be that the crime of abandonment of and failure to support a child is made by it an offense of the person who has the legal care and custody of the child and thus has the legal duty to support it. We think this was the intended and logical result of the Amendment of 1921."

We wish to note the reasoning employed by the court in arriving at their decision, first, at common law and absent a statute providing otherwise the mother is the natural guardian of her bastard child and as such has a legal right to its custody, care and control together with the inferential duty of support. Second, at common law there was no legal duty upon the father of a child born out of wedlock to support it. Third, there is no other statute which has

Honorable J. P. Morgan

changed the common law rule and specifically imposed upon the father of an illegitimate child the legal duty to support. Further, Section 559.350, RSMo. 1949, does not specifically do so and should not, giving due deference to the rule that a person should not be made subject to a criminal prosecution by implication and that criminal statutes are construed liberally in favor of a defendant and strictly against the state, be so construed, especially in view of the words of the statute "any other person having the legal care and custody of such minor child." The court indicated that these words evidenced the legislative intent to make it an offense only for a person having the legal care and custody, whether it be the parent or other person, to fail to support.

Having examined the reasoning employed in construing Section 559.350, RSMo. 1949, in the White case, what then is the effect of the 1953 amendment to this section upon the liability of a putative father to support a child born out of wedlock? There is still no other statute which changes the common law rule and specifically imposes upon the father of an illegitimate child the legal duty to support him. Does Section 559.350, as amended, impose this duty? Said section states: "If any man* * * shall, without good cause abandon or desert or shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his * * * child or children born * * * out of wedlock, under the age of 16 years * * *." Then said section concludes: "or if any other person, not the father or mother, having the legal care or custody of such minor child shall without good cause, fail, * * *." Bearing in mind the reasoning in the White case as noted in Point 4, supra, it would seem that the words "not the father or mother" were added to preclude a construction that the father must have the legal care and custody of such child or children in order to be chargeable with failure to support and to reserve such limitation to persons other than the parents. For what other purpose could it be said that this addition was intended to serve?

None of the cases decided by the appellate courts of this state, involving a construction or interpretation of this section, either directly or by inference, negative the idea that persons other than the parents might be charged thereunder if other necessary elements were present and to hold that the words were added to clarify this unquestioned proposition would indeed require a fertile imagination. We cannot convict the Legislature of a useless and futile effort if any other reasonable construction giving effect to their acts may be indulged in.

The above interpretation is further strengthened by the additional

Honorable J. P. Morgan

amendment added by the 67th General Assembly to-wit: "And it shall be no defense to such charge that the father does not have the care and custody of the child or children." While it would have been a complete defense to a charge of nonsupport under this section as construed in the White case and prior to amendment, that the father did not have the care and custody of a child born out of wedlock, such fact is now unequivocally eliminated as a defense. Reading and construing together, as we must, these two amendments and bearing in mind the time of their passage following the court's decision in the White case, it appears that it was the intention of the Legislature to make the father of an illegitimate child subject to the provisions of said section notwithstanding the fact that he does not have the legal right to care and custody. While this duty is not as specifically set forth as might be desirable in a statute of this nature we are of the opinion that it does not now rest solely upon implication and would, we believe, withstand the rule that a defendant should not be held to have committed a crime by any act which is not plainly made an offense by statute.

You further inquire what provision is made, if any, in the criminal laws of the State of Missouri relating to establishing the paternity of a child. Such procedure is commonly referred to as bastardy proceedings, the purpose of which are to determine paternity and establish liability for support. Suffice it to say that although such a statutory proceeding has been recommended to the General Assembly for adoption the General Assembly has failed to enact it into law. See State v. White, 248 S.W. 2d. 841, 1.c. 843.

While, of course, under a charge of failure to support an illegitimate child, or children, the relationship of the defendant father must be shown, we know of no reason why this parentage cannot be proved as any other element of the offense in a criminal proceeding, without infringing upon the rights reserved to a defendant in such proceedings. In regard to establishing paternity in a criminal proceedings, see C.J.S. Bastards, Section 20, page 96. See also State v. Smith, 259 S.W. 506.

CONCLUSION

It is, therefore, the opinion of this office that under the provisions of Section 559.350, RSMo. Cum. Supp. 1953, a man may be charged and convicted for failure to support his children born out of wedlock notwithstanding the fact that he does not have the legal right to the care and custody of said child, or children, and that paternity, as an element of the offense, may be established in such criminal proceedings.

This opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DEPARTMENT OF REVENUE: Appropriations from general revenue may be used
APPROPRIATIONS: to pay expenses of cigarette tax collection.



October 17, 1955

Honorable M. E. Morris
Director of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Morris:

I have received your request for an opinion of this office,
which request reads as follows:

"Senate Bill 351, which was submitted to and approved by the qualified voters of the State of Missouri provides for a two-cent per package tax on cigarettes, effective January 1st.

"The Act provides that the Division of Collection of the Department of Revenue collect the tax and describes the method. Of course, to furnish stamps, as provided, and police the operation will entail a large expenditure. The funds derived are all to be deposited in the State Treasury to the credit of the State School Moneys Fund.

"There is no specific appropriation for our use in the collection of this tax. Section 3.070 of House Bill 3 provides an appropriation for the general expenses and the collection of various taxes described '.....and all other taxes....', et cetera. This appropriation is from the General Revenue Fund. Would it be entirely proper to use money appropriated in this section for the purpose of collecting the Cigarette Tax, which is allocated by law to a specific fund in the Treasury?

"Due to the fact that we have only a short time to perfect our procedure, purchase stamps, etc., an early reply will be appreciated."

Honorable M. E. Morris

As you have stated in your opinion request, Senate Bill No. 351 does impose upon the Division of Collection of the Department of Revenue the duty of collecting the cigarette tax provided for under that bill. Section 10 of the bill provides that all taxes collected thereunder shall be deposited in the state treasury to the credit of the State School Moneys Fund.

We find no appropriation for the Department of Revenue for the express purpose of collecting the cigarette tax. As pointed out in your opinion request, Section 3.070 of House Bill No. 3 of the 68th General Assembly does appropriate money for the use of the Director of Revenue for the collection of certain specified taxes "and all other taxes * * *." This appropriation is from the general revenue fund.

Section 22 of Article IV of the Constitution of Missouri 1945 establishes the Department of Revenue. That section further provides: "The division of collection shall collect all taxes, licenses and fees payable to the state * * *." Similar provision is made by Section 136.010 RSMo 1949.

"The power to appropriate the money of the state is legislative power, and the legislature is supreme in matters relating to appropriation as to which no constitutional restrictions exist." 81 C.J.S., States, Sec. 161, p. 1203. Under the Constitution and statute, the collection of this tax is the duty of the Division of Collection of the Department of Revenue. We find no constitutional restriction which would prevent the General Assembly from paying the expense of the Division of Collection with regard to such taxes from the general revenue fund of the state, even though the proceeds of the tax go to the credit of a special fund.

As above pointed out, in the absence of constitutional limitation, the Legislature is the supreme authority in such regard. The Legislature, having appropriated funds from general revenue for the use of the Department of Revenue in collecting all taxes, we are of the opinion that such funds may be employed to pay the expense of the collection of the State Cigarette Tax.

CONCLUSION.

Therefore, it is the opinion of this office that funds appropriated to the Department of Revenue from the general revenue fund may be used by the Division of Collection in carrying out the duties

Honorable M. E. Morris

imposed upon it by Senate Bill No. 351 of the 68th General Assembly in collecting the cigarette tax imposed under said bill.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

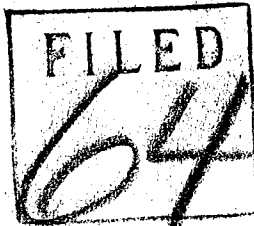
Yours very truly,

John M. Dalton
Attorney General

RRW:sm

SALES TAX:
PAPER UTENSILS:

The retailer of food and drink, which is sold upon the premises where served, should pay the sales tax upon any paper items in which such food and drink is served.



December 21, 1955

Honorable M. E. Morris
Director, Department of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"We request an official opinion to clarify our Rule No. 34, relating to the Missouri Sales Tax Act.

"The question is whether or not paper cups, paper plates, paper containers and paper souffle cups used to serve or deliver food or beverage are taxable or exempt.

"A conference was recently held with the attorneys for the Lily-Tulip Cup Corporation, participated in by this office and Assistant Attorney General Hugh P. Williamson. This question was discussed at length but no conclusion was reached."

On April 13, 1945, Tyre Burton, Legal Adviser to the Sales Tax Department, wrote an opinion construing Rule 34. A copy of this opinion is attached, is marked "Exhibit A", and is made a part of this opinion. It will be noted that the Burton opinion holds that restaurants, cafes, and any retail place selling food and drink to the public, which serves food and drink in paper plates, paper cups, and similar items, for consumption by the public at the place where sold, is liable to pay a sales tax to the manufacturer or wholesaler from whom such paper items were purchased.

The Lily-Tulip Cup Corporation, which has a large plant in Springfield, Missouri, objects to the imposition of a sales tax

Honorable M. E. Morris

on these items, and takes the position that the purveyor of food and drink should not be liable to pay a sales tax on these items, but that such tax should be paid by the person to whom the food and drink is served in and on the paper items enumerated above. The theory of the Lily-Tulip Cup Corporation on this point is that the paper items are sold to the purchaser of the food and drink at the same time and in the same manner that the food and drink is sold.

We have carefully reviewed the Burton opinion and remain of the belief that it is a correct interpretation and application of Rule 34 of the Department of Revenue, relating to the Missouri Sales Tax Act. We, therefore, reassert this opinion, and hold it to be controlling in the instant situation. In doing so, we have taken note of the rulings of other states upon this matter. We would observe that such rulings, even if upon identical statutes and rules, are not binding or controlling in the State of Missouri, but that in the majority of instances cited, such rules and regulations either do not have similar wording or are not in point upon the particular matter before us here.

In conclusion we would point out that in the interpretation of such rules as No. 34, the administrative agency may put upon it such construction as it believes to lie in the rule, unless such construction is clearly unreasonable or is in conflict with statutes governing the subject matter.

In the case of Kroger Grocery and Baking Company v. Glander, 77 N.E. 2d. 921, at l.c. 924, the court stated:

"This rule, like those of other administrative agencies, issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment governing the same subject matter. State ex rel. Kildow v. Industrial Commission, 128 Ohio St. 573, 580. 192 N.E. 873; Zangerle, Aud. v. Evatt, Tax Com'r, 139 Ohio St. 563, 572 et seq., 41 N.E. 2d 369; Helvering, Com'r, v. Winnmill, 305 U.S. 79, 83, 59 S. Ct. 45, 83 L. Ed. 52; Standard Oil Co. of California v. Johnson, Treas., 316 U.S. 481, 484, 62 S. Ct. 1168, 86 L. Ed. 1611; Helvering, Com'r. v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 59 S. Ct. 423, 83 L. Ed. 536; Neil House Hotel Co. v. City of Columbus, 144 Ohio St. 248, 252, 58 N.E. 2d. 665. And unless the rule is unreasonable or contrary to law, the Tax Commissioner must

Honorable M. E. Morris

apply it as formulated, until it is amended or repealed in the manner provided in Section 1464-4. General Code."

CONCLUSION

It is the opinion of this department that the retailer of food and drink, which is consumed upon the premises where served, should pay the sales tax upon any paper items in which such food and drink is served.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

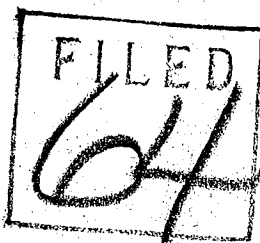
Yours very truly,

John M. Dalton
Attorney General

HPW:ld

Enclosure (1)
Copy of opinion to:
Tyre Burton, 4/13/45.

MOTOR VEHICLES:) Director of Revenue unauthorized under Pro-
) visions of Section 302.130 RSMo Cumulative
TEMPORARY INSTRUCTION) Supplement 1953, to issue temporary instruc-
) tion permit to operate motor vehicle, until
PERMITS:) applicant has satisfactorily passed the eye
) and written examination required by Section
) 302.173 RSMo Cumulative Supplement 1953.



December 27, 1955

Honorable M. E. Morris
Director of Revenue
State of Missouri
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion which reads as follows:

"The operators of Driver's License schools in Saint Louis would like to give Driver's training simultaneously with instruction on the law, et cetera, for the written test.

"We have thought Section 302.130 indicated it would be necessary for an applicant for Driver's License to have completed the eye and written tests before the applicant could drive.

"Our question now is whether or not an application may be applied for and a temporary instruction permit for sixty days may be issued prior to the time the eye test and written tests have been completed."

We understand the inquiry to be whether or not a temporary instruction permit to operate a motor vehicle can be issued to an applicant prior to the time the eye test and written test have been completed.

All statutory references herein are to the Revised Statutes of Missouri, Cumulative Supplement 1953, unless otherwise specified.

Section 302.171, provides the form and contents of an application for operator's or chauffeur's licenses and Section 302.173 requires an applicant for such license to submit to, and satisfactorily pass the examination referred to in said section before he can be issued a license. The latter section reads as follows:

"1. Any applicant for an operator's license, or chauffeur's license, who does not possess a valid operator's or chauffeur's license issued pursuant to the laws of this state shall be examined as herein provided. Any person who has failed to renew his operator's license or chauffeur's license on or before the date of its expiration or within sixty days thereafter must take an examination. No applicant for a renewal license shall be required to submit to any examination of his ability to safely operate a motor vehicle over the highways of this state unless the facts set out in such renewal application or record of convictions on the expiring license, or the records of the director show that there is good cause to authorize the director to require the applicant to submit to such examination. Such examination shall be conducted in the county where the applicant resides within sixty days from the date of the application. Reasonable notice of the time and place of such examination shall be given the applicant by the person or officer designated to conduct same. It shall include a test of the applicant's natural or corrected vision, his ability to understand highway signs regulating, warning or directing traffic, his practical knowledge of the traffic laws of this state, and an actual demonstration of ability to exercise due care in the operation of a motor vehicle. If the director has reasonable grounds to believe that an applicant is suffering from some known physical or mental ailment which ordinarily would interfere with the applicant's fitness to operate a motor vehicle safely upon the highways, he may require that such examination include a physical or mental examination by a licensed physician of the applicant's choice, at the applicant's expense, to determine such fact. The director shall prescribe regulations to insure uniformity in the examinations and in the grading thereof and shall prescribe and furnish all forms to the members of the highway patrol and to other persons authorized to conduct examinations as may be necessary to enable such officer or person to properly conduct such examination. The records of such examinations shall be forwarded to the director who shall not issue any license hereunder, either as a chauffeur or as a motor vehicle operator, if in his opinion the applicant is not qualified to operate a motor vehicle safely upon the highways of this state.

Honorable M. E. Morris

"2. The director of revenue shall delegate the power to conduct the examinations required under this section to any member of the highway patrol, to any school instructor, teacher, or public officer qualified to give driving examinations, or to any other person so qualified who is employed by any established association or corporation which has for its object, in whole or in part, the promotion of safety in the operation of motor vehicles, when he finds, after due investigation, that such person is so qualified to conduct such examination. The powers delegated to any such examiner may be revoked at any time by the director of revenue upon notice."

Section 302.177, authorizes the director of revenue to issue operator's or chauffeur's licenses to all applicants who have submitted a satisfactory application and met all the requirements of Chapter 302.

Section 302.130, authorizes the director of revenue to issue temporary instruction permits under the conditions mentioned in said section and which reads as follows:

"1. Any person who, except for his lack of instruction in operating a motor vehicle, would otherwise be qualified to obtain an operator's license under this chapter may apply for and the director shall issue a temporary instruction permit entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of sixty days, but any such person, except when operating a motorcycle, must be accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver.

"2. The director, upon proper application, in his discretion, may issue a restricted instruction permit effective for a school year or more restricted period to an applicant who is enrolled in a driver training program approved by the state department of education, even though the applicant has not reached the age of sixteen years but has passed the age of fifteen years. Such instruction permit shall entitle the applicant, when he has such permit in his immediate possession, to operate a motor vehicle

Honorable M. E. Morris

on the highways, but only when an instructor approved by the state department of education is occupying a seat beside the driver.

"3. The director in his discretion, may issue a temporary driver's permit to an applicant for an operator's license permitting him to operate a motor vehicle while the director is completing his investigation and determination of all facts relative to such applicant's rights to receive an operator's license. Such permit must be in his immediate possession while operating a motor vehicle, and it shall be invalid when the applicant's license has been issued or for good cause has been refused."

From these two sets of statutes it is plain that a temporary instruction permit is not an operator's or chauffeur's license to operate a motor vehicle and that the two types of licenses are alike only in one respect, and that is to permit the holder of either license to drive a motor vehicle upon the State highways during the period for which the license was issued and while it is in effect.

A chauffeur's license permits the holder to operate a motor vehicle upon any or all of the highways of the State for a period of one year from the date of issuance and said license must be carried by the holder at all times he is operating a motor vehicle. The fee for such license is \$3.00 payable in advance.

An operator's license permits the holder to drive a motor vehicle upon any or all of the public highways of the State, and is issued for a period of three years and must be carried at all times the holder is operating a motor vehicle. The fee for such license is \$1.00 payable in advance. Operator's or chauffeur's licenses may be suspended or revoked by the director of revenue for the causes mentioned in Chapter 302, at any time upon the statutory procedure being followed.

Upon examining the provisions of Section 302.130, we find the director of revenue may issue a temporary instruction permit to any person, who except for his lack of instruction in operating a motor vehicle, would otherwise be qualified to obtain an operator's or chauffeur's license. Said permit is issued for a period of sixty days and allows the holder to operate a motor vehicle upon the public highways. Only when he is in possession of such license, which is then in effect, and when the licensee is accompanied by a licensed operator or chauffeur who occupies a seat beside the driver, can he legally operate a motor vehicle upon the public highways.

Honorable M. E. Morris

Within his discretion the director of revenue may issue a restricted instruction permit, effective for a period not in excess of a school term, to an applicant who is past fifteen and has not reached sixteen years of age, and who is enrolled in a driver training program approved by the State Department of Education. The licensee must carry the license with him and is entitled to operate a motor vehicle upon the State highways if a licensed operator or chauffeur approved by the State Department of Education accompanies such driver. The license fee is twenty-five cents payable in advance, and permits the holder to operate a motor vehicle for the period for which it was issued.

Section 302.020 makes it unlawful to operate a motor vehicle upon the public highways without a license, and inexperienced drivers will find it very difficult to become experienced ones without being permitted to drive vehicles upon said public highways. It is believed the legislative intent in the enactment of Section 302.130 supra, was for the purpose of affording a remedy by which inexperienced student drivers might lawfully operate motor vehicles upon the public highways while receiving their driver education.

Section 302.130 supra, does not specifically provide that an applicant for a temporary instruction permit shall submit to and satisfactorily pass an eye test and a written examination, demonstrating his ability to drive a motor vehicle, similar to the provisions of Section 302.173 supra, before the director of revenue is authorized to issue the temporary permit. However, it is believed that such was the legislative intent and purpose in the enactment of the section and that such intent appears from the following language expressed in Section 302.130 supra: "Any person who, except for his lack of instruction in operating a motor vehicle, would otherwise be qualified to obtain an operator's license under this chapter may apply for and the director shall issue a temporary instruction permit ***."

We construe this section as requiring all applicants for a temporary instruction permit to possess the qualifications required of applicants for operator's and chauffeur's licenses as provided by said Chapter 302 RSMo Cumulative Supplement 1953, unless exempted therefrom by statute. We have previously noted that Section 302.173, supra, requires applicants for operator's or chauffeur's licenses to successfully pass the eye test and written examination, and that Section 302.130 supra does not exempt applicants from the temporary permits from all the requirements of Section 302.173. The only exemption is that applicants for temporary permits are not required to have been instructed in the operation of motor vehicles. It is believed that such an applicant must possess all the other qualifications of applicants for operator's or chauffeur's licenses.

Honorable M. E. Morris

In answer to the inquiry of the opinion request it is our thought that the director of revenue is unauthorized to issue a temporary instruction permit to an applicant prior to the time he has passed his eye test and written examination authorized by Section 302.173.

CONCLUSION

It is the opinion of this department that the director of revenue is unauthorized under the provisions of Section 302.130, RSMo Cumulative Supplement 1953, to issue a temporary instruction permit to operate a motor vehicle to an applicant who has not satisfactorily passed the eye test and written examination required by Section 302.173, RSMo Cumulative Supplement 1953.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

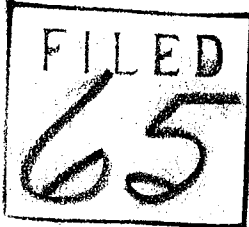
Yours very truly,

JOHN M. DALTON
Attorney General

PNC/ma/bi

CLERK:
PROBATE COURT:
PROBATE COURT CLERK:
OFFICERS:
INCOMPATIBILITY OF OFFICES:
INHERITANCE TAX:

The offices of probate clerk and appraiser of an estate before the probate court are incompatible, and thus may not be held by the same person at the same time.



September 29, 1955

Honorable Chas. E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Sir:

This is in response to your request for an opinion which reads as follows:

"I would like to have your opinion on whether or not a Probate Judge may legally appoint the clerk of his court as an appraiser for the purpose of appraising an estate for State Inheritance Tax."

Section 145.150 limits the appointment of an appraiser to "a qualified tax-paying citizen of the county, who is not executor, administrator or beneficially interested in said estate or the attorney for any of such parties" This statutory provision, thus, does not expressly prohibit the appointment of the clerk of a probate court as an appraiser.

Although such an appointment would not contravene a Missouri statute, the common law rule in regard to the holding of two offices could be violated. 67 C.J.S., Section 23, pages 133 to 136, states this rule, in part:

"At common law the holding of one office does not itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. * * *

Honorable Chas. E. Murrell, Jr.

"* * * the general rule is that the inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or the power to remove the incumbent of the other, or to audit the accounts of the other, the question being whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other.* * *"

The Missouri Supreme Court has also elaborated this principle in *State ex rel. Walker v. Bus*, 135 Mo. 325, at page 338:

"* * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him. (Emphasis added.)

"It was said by Judge Folger in *People ex rel. v. Green*, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result

Honorable Chas. E. Murrell, Jr.

in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other.* * *

To determine then whether the two offices are incompatible requires an analysis of the functions of both the appraiser and the probate clerk. It should be added that it is not necessary in showing incompatibility that all the duties clash so long as some conflict. Sections 145.150 through 145.190, RSMo 1949, specify the duties of the appraiser as follows:

"145.150. 4. Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as such appraiser and that he will appraise all the property, estate, interest therein or income therefrom involved in the proceeding in which he is appointed at its clear market value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date so fixed and shall also give notice by mail to all interested persons whose address he may have, always including the director of revenue and the prosecuting attorney of the county.

"145.160. 1. The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath.

"2. He shall make report of his appraisal to the court in writing and shall return the testimony of the witnesses and all other evidence and such other facts in relation thereto as the court may by its order require, and such

Honorable Chas. E. Murrell, Jr.

report shall be made within twenty days after the appointment of such appraiser, unless the court, for good and sufficient cause, by order gives such appraiser further time in which to report; provided, when the estate consists of personal property only, the prosecuting attorney may, with the consent of the director of revenue agree with the parties liable to pay any tax upon the amount of the same, and the court, if it approves such agreement, shall enter judgment accordingly and no appraiser shall be appointed."

"145.170.--1. Any interested person, including the director of revenue, attorney general or prosecuting attorney of the county may file exceptions to the report of the appraiser within thirty days after the date same is filed, specifically pointing out his or their objection thereto, and such exception shall be determined by the court in a summary manner.

"2. Any person aggrieved by the judgment of the court as to the amount of liability for the tax may appeal to the court having jurisdiction of appeals from said court in ordinary civil actions, and in case of appeal the appellant shall be required to give bond to the state in double the amount of the tax, interest, penalty and costs involved, conditioned to pay all taxes, interest and penalties assessed and costs taxed by the appellate court.

"145.180.--The report of the appraiser shall be filed with the court in duplicate, one of which duplicate copies, together with the certificate of the court or clerk shall be forwarded to the director of revenue within five days after the amount of said tax shall be fixed.

"145.190.--1. The appraiser shall be entitled to a reasonable fee for the time he is engaged in hearing the evidence, viewing the property,

Honorable Chas. E. Murrell, Jr.

and preparing, and filing his reports, and the actual and necessary expenses incurred by him in the performance of his duties, which together with all witness fees and other costs shall be taxed against and paid by the administrator, executor, or trustee as other costs of the estate, and if no administration is pending, then by the person liable for the tax, but before the appraiser shall be entitled to his fee or expenses he shall file with the court appointing him a sworn statement of the same and the court shall allow him a reasonable fee and expenses actually and necessarily paid by him in the performance of his duty as such appraiser. (RSMo Cumulative Supplement, 1953).

It is clear that "the court" referred to throughout these sections plays a supervisory rule in regard to the work of the appraiser. Section 483.480, RSMo 1949, must be noted as well, which section provides:

"* * * Upon qualifying, said clerk may discharge all the duties of clerk and shall have power and authority to do and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation, subject to the confirmation or rejection of said court at the next regular term held thereafter."

Interpreting a similar statute, the Supreme Court of Missouri in *Young v. Boardman*, 10 S.W. 48, 97 Mo. 181, at page 189, speaking of the probate clerk, has said:

"* * * The clerk thus appointed is required to give bond before entering upon the duties of 'his office,' conditioned to discharge the 'duties of his office.' And when so appointed and qualified, 'may discharge all the duties of clerk and shall have power to do and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation,' etc. Throughout the law relating to the administration of estates of deceased persons and the probate of wills, various

Honorable Chas. E. Murrell, Jr.

duties are assigned to probate clerks, When the judge appoints a clerk, these duties devolve upon the clerk thus appointed. There can be no doubt but he is the clerk of the court and an officer of the court, and not in any sense the clerk of the judge."

Moreover, Walker v. Bus, supra, states that incompatibility of two offices may stem from situations where one officer is "required to deal with, control or assist" another officer. Probate clerks of necessity meet this condition vis-à-vis the appraisers appointed by the probate judge.

It should be noted as well that House Bill 30, 68th General Assembly (The Probate Code of 1955, Effective January 1, 1956), makes even clearer the inherent incompatibility of these two offices due to the supervision, control and assistance rendered the appraiser by the probate clerk:

"Section 6. The court shall be open for the transaction of probate business at all reasonable hours. The court may by rule provide for the holding of sessions of the court at regular recurring times for the purpose of hearing claims, settlements and other matters but no such rule shall prohibit the hearing and determination of any proceeding before the court at any time when necessary to promote the ends of justice.* * *"

"Section 8. 1. The clerk may take acknowledgments, administer oaths, and certify and authenticate copies of instruments, documents and records of the court, and perform the usual functions of his office.

"2. Subject to control of the judge, the clerk may issue notices and make all necessary orders for the hearing of any petition or other matter to be heard in the court.

"3. If a matter is not contested, the clerk may hear and determine it and make all orders,

Honorable Chas. E. Murrell, Jr.

judgments and decrees in connection therewith which the judge could make, subject to be set aside or modified by the judge at any time within thirty days thereafter; but if not set aside or modified the orders, judgments and decrees made by the clerk shall have the same effect as if made by the judge.

"Section 17. 2. No appeal shall be allowed from any order made by the clerk under section 8 unless a motion to modify or vacate such order has been denied by the court but no such motion is necessary to an appeal from any order made by the judge.

"Section 21. All appeals shall be taken within thirty days after the decision complained of is made. Where a motion to modify or vacate an order made by the clerk is denied or where such order is modified or vacated, the appeal shall be taken within thirty days after the order sustaining, modifying or vacating the order is made."

According to the common law principle as interpreted by the Supreme Court of Missouri, it is not within the public interest, thus, for a probate clerk to serve as an appraiser.

CONCLUSION

It is, therefore, the opinion of this department that the offices of probate clerk and appraiser of an estate before the probate court are incompatible and thus may not be held by the same person at the same time.

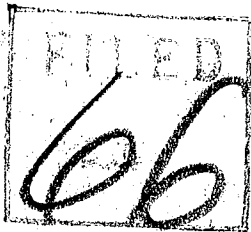
The foregoing opinion, which I hereby approve, was prepared by my assistant, Walker La Brunerie, Jr.

Yours very truly,

John M. Dalton
Attorney General

STATE PURCHASING AGENT:

The State Purchasing Agent does not have to obtain the approval of a state department, for which he is by law authorized to make purchases, before he issues purchase orders against the funds of such department.



February 3, 1955

Honorable Edgar C. Nelson
State Purchasing Agent
Division of Procurement
State of Missouri
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Will you please advise me in these premises:

"What should be my attitude toward any department for which I, as state purchasing agent, am authorized by law to make all purchases in excess of fifty dollars, when such department insists that I issue no purchase orders against their funds unless approved by said department.

"As I read the law, that as purchasing agent, I am charged with the responsibility to purchase, under certain restrictions imposed on me by the procurement law, all supplies requisitioned by any department. Therefore I feel I cannot properly shirk this duty or relinquish my purchasing authority to any department coming under the jurisdiction of the procurement law.

"In taking this position I am not unmindful of the propriety of my conferring with any department regarding any requisition or purchase order. My policy has always been to cooperate with all departments within the bounds of reason. However, if I were to be compelled to seek approval of any department before writing a purchase order I see no reason why any other

Honorable Edgar C. Nelson

or all departments should not, if they so wish, ask to be included under the same rule. If such practice became widespread, it seems to me my position as state purchasing agent would become intolerable and the basic purpose of centralized procurement would be defeated.

"I think I have already been advised by your office that our mailing list for use in seeking sealed bids from any vendor is a mechanism which is set up by and entirely under the control of the state purchasing agent. However, this does not mean that any interested person cannot suggest names to be added to such list, but same must have my approval to be put on the list permanently to receive bids."

The only issue that we see in the situation outlined by you above is whether, in the case of a department for which you are authorized by law to make all purchases in excess of \$50.00, you are required to secure the approval of the department before you issue purchase orders against the funds of the department. In this regard we direct your attention to Section 34.030, RSMo 1949, which reads:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the contribution of the state."

We find no other law than the above which is applicable to your situation, and we see nothing in this law which would give rise to the conclusion that you had to obtain the approval of a department for which you are authorized by law to make purchases before you issue purchase orders against the funds of such department.

CONCLUSION

It is the opinion of this department that the state

Honorable Edgar C. Nelson

purchasing agent does not have to obtain the approval of a state department for which he is by law authorized to make purchases before he issues purchase orders against the funds of such department.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

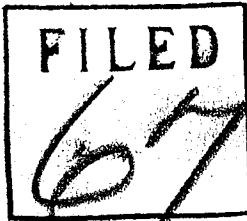
Very truly yours,

JOHN M. DALTON
Attorney General

HPW:ld;da

INSURANCE:
FARMERS' MUTUALS:

Farmer's mutual insurance companies organized under, or accepting, the provisions of H.B. 249, 67th General Assembly are permitted to write "miscellaneous" coverage referred to in subparagraph 4, Section 4 of the Act only if a guaranty fund or policyholders' surplus of not less than \$400,000.00 is maintained.



January 5, 1955

Honorable William Harrison Norton
Member, Missouri House of Representatives
406 Armour Road
North Kansas City, Missouri

Dear Mr. Norton:

This formal opinion is in reply to your original request of October 19, 1954 for a ruling touching certain provisions of House Bill #249, passed by the Sixty-Seventh General Assembly of Missouri. We extract from the fourth paragraph of your letter of October 19, 1954 the direct question you posed in the following language:

"The question that I am interested in is a company that plans to write business under Section 4, Subdivision 4, required to have a safety fund, as defined in the act, in the amounts set out in this bill or are they required to maintain a surplus as used in this general sense in the amount set out in the bill."

House Bill No. 249, passed by the Sixty-Seventh General Assembly of Missouri, is found in Laws of Missouri, 1953, pp. 252-263. The Act pertains to the formation of farmers' mutual insurance companies, and to the acceptance of such law by previously organized farmers' mutual insurance companies and county mutual insurance companies. Section 1 of House Bill No. 249 is a statute containing definitions, and insofar as it refers to "safety fund" provides:

"As used in this act unless the context clearly indicates otherwise:

Honorable William Harrison Norton

* * *

"(5) 'Safety fund' means accumulated assets in excess of accrued losses and expenses."

Section 4 of the Act specifies and describes three specific classes of property insurance which may be written, and in subparagraph (4) of Section 4 we find authority for writing insurance other than that described in the three previous subparagraphs. Such authority is found in the following language:

"(4) Miscellaneous. Insurance against any other insurance risk specified in the articles of incorporation which is not by law prohibited to fire insurance companies doing business under the general insurance laws of this state and for which specific provision is not made in this act."

The question to which this opinion is addressed discloses that we are dealing with a company which contemplates writing business generally described as "miscellaneous" in subparagraph (4) of Section 4 of the Act, quoted above.

Section 6 of the Act sets forth requirements to be met by companies desiring to write any one of the four different, and separately described classes of risks set forth in Section 4 of the Act. Subparagraph 4 of Section 6 of the Act has particular application to the "miscellaneous" coverage described in Section 4 of the Act and provides as follows:

"To make the kinds of insurance described in section 4, subdivision (4) a company shall have at least one hundred million dollars net insurance at risk under one or more of other subdivisions of section 4, and a safety fund of at least two hundred thousand dollars. With respect only to such kinds of insurance described in section 4, subdivision (4) a company shall maintain such liabilities, reserves and amount of surplus or safety fund as are required of fire insurance companies writing such kinds of insurance under the general insurance laws of this state,

Honorable William Harrison Norton

and shall observe the same provisions regarding insolvency of the insured, notice by the insured and the operation by other persons of an insured motor vehicle, as apply to motor vehicle liability policies issued by fire insurance companies operating under the general insurance laws of this state."
(Underscoring supplied.)

The underscoring portion of subsection 4 of Section 6 of the Act clearly states the minimum requirements as to reserves, surpluses or safety funds to be maintained by companies which are to engage in writing "miscellaneous" insurance as defined in subparagraph 4 of Section 4 of the Act, and it is of special interest to note that such reserves, surpluses and safety funds are not described in definite amounts of money, but the language of the Act refers us directly to the law governing fire insurance companies writing such "miscellaneous" insurance under the general insurance laws of Missouri. And when we turn again to the definition of the term "safety fund" found in Section 1 of the Act we cannot help but discover that the stated definition of "safety fund" is to be applied throughout the Act "unless the context clearly indicates otherwise." The context of the Act as discovered at subparagraph 4 of Section 6, clearly discloses that the term "safety fund" is not to be accorded the narrow meaning it has when referred to in the stated requirements to be met by companies writing the types of insurance defined in subparagraphs 1, 2 and 3 of Section 4 of the Act.

The general insurance law applicable to fire insurance companies, and which is directly referred to in subparagraph 4 of Section 6 of the Act is Chapter 379 RSMo 1949, and the particular statute in such law which prescribes for a guaranty fund or policyholders' surplus, when a mutual fire insurance company desires to write the "miscellaneous" risks referred to in subparagraph 4 of Section 4 of the Act being construed, is Section 379.010 RSMo 1949 which provides that the mutual company must have a guaranty fund or policyholders' surplus of four hundred thousand dollars.

If additional argument is required to support the conclusion hereinafter stated, we need only refer to subparagraph 5 of Section 6 of the Act which provides:

Honorable William Harrison Norton

"To make more than one of the kinds of insurance described in section 4 a company shall meet the total combined requirements as set out in this section relating to the making of such different kinds of insurance, or in lieu of these requirements shall have a safety fund of at least two hundred fifty thousand dollars, shall be operating under this act, and with respect to the kinds of insurance described in section 4, subdivision 4 shall comply with the requirements of subsection 4 of this section." (Underscoring supplied.)

The above quoted subparagraph 5 of Section 6 of the Act, while giving companies which write one or more of the first three defined classes of risks set forth in subparagraph 4 of Section 4 of the Act the option of meeting combined safety fund requirements applicable to two or three of the defined risks being written, or of establishing a safety fund of two hundred fifty thousand dollars, does make provision for companies writing "miscellaneous" coverage to be subject to the requirements set forth in the preceding subparagraph 4 of Section 6 of the Act.

CONCLUSION

It is the opinion of this office that farmers' mutual insurance companies organized under, or accepting, the provisions of House Bill No. 249, passed by the Sixty-Seventh General Assembly, may qualify to write "miscellaneous" coverage referred to in subparagraph 4 of Section 4 of the Act only in the event that such companies maintain a guaranty fund or policyholders' surplus of not less than four hundred thousand dollars.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

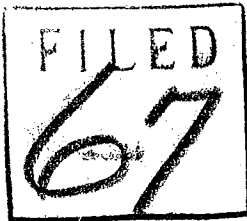
Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

CITIES: (1) Receipts from parking meters may be used
PARKING METERS: only for the purpose of purchasing, installing
and maintaining such meters and enforcing
regulatory ordinances in connection therewith;
(2) Parking meter receipts should be, but are not necessarily
required to be, carried in a separate fund by the city treasurer.

January 21, 1955



Hon. William Harrison Norton
Representative, Clay County
406 Armour Road
North Kansas City, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"The city attorney of the City of Liberty
has requested me to ask you for an opinion
concerning the way in which parking meter
receipts may be spent. Specifically, these
are his questions:

"1. For what purpose or purposes may park-
ing meter receipts be spent?

"2. Should the parking meter receipts be
deposited in the general revenue fund or
should a special parking meter fund be main-
tained by the city treasurer?

"It appears that some argument has developed
with the city officials as to the proper use
of the parking meter receipts.

"Your cooperation will be very much appre-
ciated. * * * "

I.

The determination of your first question requires a con-
sideration of the nature of receipts from parking meters. That
cities have the power to regulate traffic through the medium
of such devices, appears in *Wilhoit, et al. vs. City of
Springfield, et al.*, 171 S.W.2d 95. The opinion in this case

Hon. William Harrison Norton

was cited with approval by the Supreme Court of Missouri in State ex rel. Audrain County vs. City of Mexico, reported 197 S.W. 2d 301, wherein the court said, l.c. 303:

"The regulation of the parking of automobiles on its streets by a city is a valid exercise of the State's delegated police power. City of Clayton v. Nemours, 353 Mo. 61, 66(3), 182 S.W. 2d 57, 59 (4), appeal dismissed, 323 U.S. 684, 65 S.Ct. 560, 89 L.Ed. 554; City of Clayton v. Nemours, 237 Mo.App. 167, 180, 164 S.W. 2d 935, 942 (16); Nemours v. City of Clayton, 237 Mo. App. 497, 509, 175 S.W. 2d 60, 65 (1, 2). This is also true of such regulation by means of parking meters. Wilhoit v. City of Springfield, 237 Mo. App. 775, 784, 786, 171 S.W. 2d 95, 98 (2,9). * * * "

In the Wilhoit case, attack was made upon a parking meter ordinance of the defendant City of Springfield. Among other grounds of claimed invalidity of the ordinance was an alleged conflict with a portion of what was then Section 8395 R.S.Mo. 1939, limiting the amount of license tax or fees which might be imposed by such municipalities. In disposing of this contention, the court in the Wilhoit case said, l.c. 100:

"As we view it the Legislature did not intend by the enactment of subsection 'c' to abrogate, abridge, restrict or limit the police power delegated to the city and that the provisions of the said subsection 'c' do not prevent the collection of a fee that is merely incidental and referable only to the police power, and enacted only for the purpose of purchasing, installing, maintaining and enforcing such regulatory provisions. Such fee is not in the nature of a tax as that term is ordinarily used; nor is it a rental fee, but is a fee or charge referable solely to the police power of the city to regulate parking and is to be used for the purposes above enumerated. * * * "
(Emphasis ours.)

As pertinent to the matter under consideration, we quote further from the opinion in the same case as found l.c. 101:

Hon. William Harrison Norton

"The burden of establishing the fact, if it be a fact, that the ordinance is a revenue measure is cast upon plaintiffs. And this is true whether it is solely for the purpose of raising revenue or for the double purpose of regulating the parking of automobiles and raising revenue. The ordinance is valid if a regulation and void if a tax." (Emphasis ours.)

The foregoing discloses the usage to which receipts from parking meters may lawfully be put, viz., purchasing, installing and maintaining such devices and enforcing regulatory ordinances incident thereto. The appellate courts might very well hold that ordinances relating to off-street parking could very well be included in the general comprehensive scheme of city-wide traffic regulation. If such a decision be reached, then, of course, the receipts from parking meter operations could be used for the payment of off-street parking facilities.

It is a matter of common knowledge that the charge made for parking cannot be related with arithmetical preciseness to the expenses incurred by the municipality, and therefore, in determining the reasonableness of such charges, the courts have permitted a substantial latitude therein. However, the fundamental principle remains that such charges theoretically, in accordance with the rule applicable to all other fees of like nature, must not unduly exceed the expenses to the city incurred in enforcing the same.

In the event that such charges are unreasonable, so that in effect the parking meter ordinance becomes, in fact, a revenue measure, its validity cannot be sustained and the following rule of law would become applicable. We quote from the Wilhoit case again, l.c. 102:

"The evidence also tended to show that prior to and at the time the parking meter ordinance was passed the purpose of defendants was to collect a sufficient amount from the meters, over and above the expense incident to the regulatory provisions of the ordinance, to enable the city to reduce or repeal the gasoline tax then being collected. If that was the purpose in adopting the ordinance we would be constrained to say in the language of Judge Sturgis,

Hon. William Harrison Norton

Commissioner in the case of State ex rel. Marlowe v. Himmelberger-Harrison Lbr. Co., 332 Mo. 379, 58 S.W.2d 750, 754: 'This may be a laudable purpose from one standpoint, but from a legal standpoint it constitutes legal fraud.' Russell et al. v. Frank, et al., 348 Mo. 533, 154 S.W. 2d 63." (Emphasis ours.)

II.

Your further question presents one solely related to the proper method of maintaining the accounts of the city funds by the treasurer. In view of what has been said under I, supra, as to the purposes for which parking meter receipts might be used, it seems obvious that for accounting purposes a special fund should be established in the city treasury in order that persons interested therein, including both city officials and others, might readily ascertain that the funds deposited therein were, in fact, being used for the lawful purposes which have been enumerated. However, we do not find any statute specifically requiring such separation of funds, and our thinking in this regard reflects solely our concept of a public policy making readily available to persons having a lawful interest therein knowledge of the fiscal affairs of municipalities.

CONCLUSION

In the premises, we are of the opinion that receipts from parking meters may be lawfully used only for the purpose of purchasing, installing and maintaining such meters and for the enforcement of regulatory ordinances reasonably related thereto.

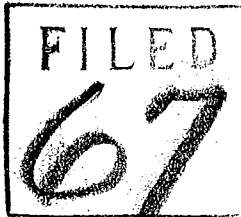
We are further of the opinion that the statutory law does not require that such receipts be placed in a separate fund in the city treasury, but that such a course is dictated by sound public policy and efficient accounting practices.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

JURY COMMISSIONERS: No statute for jury commissioners
in Clay County.



February 14, 1955

Honorable Wm. Harrison Norton
Missouri House of Representatives
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this
office, which request reads as follows:

"We have another problem in Clay County
arising from the recent change of our
status from a third class county to a
second class county. I am respectfully
requesting your opinion as to the appli-
cability of the jury commission status
to our county.

"As I see it, Section No. 494.230 pro-
vides for the creation of the jury
commissioners in class three and four
counties.

"Sections 495.040 and 495.050 provide
for the appointment of the jury com-
mission in counties from 60,000 to
200,000 inhabitants.

"As you know the 1949 census gave Clay
County approximately 49,000 residents.
Our conservative estimates, to date,
give it as being 64,000. As I see it
there are no other provisions of the
Statutes that could be applicable to
our County inasmuch as it would appear
apparent that it was intended that
second class counties be included under
provisions of Chapter 495. It would
seem that this should be applicable to
our County. It is, of course, important

Honorable Wm. Harrison Norton

to our clerk, Mr. Clifford G. Hall, as it means five hundred dollars a year to him.

"At any rate, I would appreciate an official opinion from you regarding this matter, advising us under what section of the Statutes we are to select a jury commission."

As you have pointed out, Section 494.230 provides for a jury commission in counties of the third and fourth classes. Clay County became a county of the second class as of January 1, 1955, and therefore that section is no longer applicable to Clay County. Section 495.040, MoRS, 1953 Supp., provides:

"In every county of this state now containing or which may contain hereafter, according to the last preceding national census, not less than sixty thousand inhabitants nor more than two hundred thousand inhabitants, petit jurors for the circuit court and for the court having jurisdiction of felony cases, and also for any magistrate court having jurisdiction in such counties where the magistrate files written request with the jury commission board, shall be selected as in this chapter provided."

Section 495.050 then proceeds to set out the composition of the jury commission in such counties. The 1950 census showed a population for Clay County of 45,221, and therefore Sections 495.040 and 495.050 do not apply to Clay County. We find no other statute providing for the formation of a jury commission which is applicable to Clay County.

Section 8 of Article VI of the Missouri Constitution, 1945, provides as follows:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

Honorable Wm. Harrison Norton

While this constitutional provision provides that a law applicable to one county shall apply to all counties in the class to which such county belongs, this provision does not have the effect of causing Section 495.040, above quoted, to become applicable to all counties of the second class. In view of the fact, however, that such section and sections subsequent thereto applicable to such counties do not apply to all counties of the second class, some question might arise as to the validity of that section under the above-quoted constitutional provision. See State ex inf. Taylor v. Kiburz, 357 Mo. 309, 208 S.W. (2d) 285. However, the invalidity of this section would not provide a section applicable to Clay County, and we therefore do not pass upon the validity of the section as it now stands. We do recommend, however, that appropriate legislation be enacted to cover all counties of the second class.

CONCLUSION

Therefore, it is the opinion of this office that there is now no statutory provision for the formation and composition of a board of jury commissioners for Clay County.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Very truly yours,

JOHN M. DALTON
Attorney General

RRW:ml

COUNTY COLLECTORS
(class two counties):
COMPENSATION:

Collectors of revenue in counties of the second class to be compensated under the provisions of Sec. 52.420, MoRS, Cum. Supp., 1953, and may not retain fees for collection of drainage or levee district taxes.



May 5, 1955

Honorable Wm. Harrison Norton
Member, House of Representatives
Room 413, Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The existing law of Missouri requires the County Collector to be the collector for levee and drainage districts and provides for the payment of a certain percentage to him for his services. It also requires that he furnish a bond at his own expenses.

"The existing law regarding the salary of a collector in second class counties such as Clay County sets the salary by statute and states that it is in lieu of all the fees.

"I would like to request an official opinion as to whether the Collector of Clay County can collect the statutory commission due him from levee and drainage districts.

"For your information I have discussed this matter with your Mr. Berry. I personally feel that he is entitled to retain this additional income after reviewing the statutes. I would appreciate it if you would give me your opinion at your earliest convenience."

Honorable Wm. Harrison Norton

The compensation of collectors of revenue in counties of the second class, together with the limitation applicable thereto, is provided under Section 52.420, MoRS, Cum. Supp., 1953, reading as follows:

"1. The county collector in all counties of the second class, shall receive as compensation for his services, an annual salary of five thousand dollars, to be paid by the county in twelve equal installments out of the county treasury.

"2. For the additional duties imposed by sections 52.361, 52.362, and 52.363, said collector shall receive as compensation for his services an annual salary of one thousand dollars payable in the same manner as provided in subsection 1 of this section.

"3. Such salary shall be in lieu of all fees, commission, penalties, charges and other compensation now charged, received or allowed by virtue of any statute, to any such collector as compensation for his services."

The "additional duties" referred to in paragraph 2, supra, are not related to the matter under discussion and, therefore, no further consideration will be given thereto.

Section 242.550, RSMo 1949, forming a part of Chapter 242 relating to drainage districts, provides in part as follows:

"* * * * * The said collector shall retain for his services one per cent of the amount he collects on current taxes and two per cent of the amount he collects on delinquent taxes."

The question which you have presented arises from the conflict in the statutes quoted.

It is, of course, fundamental that in the construction of statutes the prime requisite is the ascertainment of the intention of the Legislature in the enactment thereof. The rule has been stated in *State ex inf. Dalton v. Dearing* reported 263 S. W.

Honorable Wm. Harrison Norton

2d 381, wherein the Supreme Court of Missouri said, l. c. 386:

"Another general rule of importance in determining the true meaning and scope of constitutional or statutory provisions is the intent and purpose of the lawmakers. *Graves v. Purcell*, 337 Mo. 574, 582(2), 85 S. W. 2d 543, 547(3)."

Another rule of importance in statutory construction is one which presumes the knowledge of other laws relating to the subject matter on the part of the Legislature in its consideration of a proposed law. The rule is stated thusly in *Sikes v. St. Louis & S F R Co.*, 127 Mo. App. 326, l. c. 334-35:

"In examining this statute and seeking to arrive at the legislative intention therein manifested, we must do so with the knowledge that the Legislature is presumed to know the existing state of the law relating to subjects with which they deal at the time they act on a given question, and therefore are deemed to have dealt with the matter in the light of the state of the law then existing. (See *Sutherland on Statutory Construction* (2 Ed.), sec. 447.) * * * * *

With these rules in mind, we have examined the provisions of Section 52.270, RSMo 1949, relating generally to the subject matter of the compensation of collectors of revenue in the various counties of the state. Your attention is particularly directed to the following portion of this statute which, after imposing maximum limitations upon compensation of such officials, concludes with the following significant language:

"* * * * but shall not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes, and the compensation of the county collector for the collection of levee taxes and ditch taxes, collected for drainage purposes, shall be one per cent of the amount collected."

This statute refers to Section 52.260, RSMo 1949, which provides the schedule of fees which may be retained in certain counties, but is inapplicable to counties in which the compensation

Honorable Wm. Harrison Norton

of collectors of revenue is fixed by statute. The first sentence of this latter statute reads as follows:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more: * * * * *"

Giving due regard to the rule enunciated in the Sikes case, supra, it is apparent that in the enactment of Section 52.420, MoRS, Cum. Supp., 1953, the Legislature was chargeable with knowledge of the quoted portion of Section 52.270, RSMo 1949. In these circumstances it must be held that in fixing the salary provided in Section 52.420, MoRS, Cum. Supp., 1953, due consideration was given to all of the then existing fees, commissions, penalties, charges and compensation of every nature previously received by collectors of the revenue in counties of the second class, and that the all-inclusive phraseology employed in the statute discloses a legislative intent that no other compensation in any form may be received by such officers.

It is also to be noted that the statute fixing the salary of collectors of revenue in counties of the second class was enacted long after the statute relating generally to commissions of collectors of revenue. The latter statute has retained its present form substantially for many years, whereas the salary statute first appeared as an act found Laws of Missouri, 1945, page 1556, and subsequently in Laws of Missouri, 1951, page 403. The relative dates of enactment of the two statutes bear upon the construction to be accorded them following the rule found in *Vining v. Probst*, 186 S. W. 2d 611, from which we quote, l. c. 615:

"The 'Small Loan Laws' deal primarily with the subject of interest; but their effect is restricted to loans and credits not exceeding \$300 in value or amount. No provision is therein incorporated for the repeal of the general interest laws as they existed in 1927; but existing statutes may be repealed by necessary implication if a later act is so repugnant to the former that the two cannot stand, even though no mention is made

Honorable Wm. Harrison Norton

of the former act in the later.
State ex rel. Matacia v. Buckner,
300 Mo. 359, loc. cit. 367, 254 S.
W. 179. However, repeal by impli-
cation is not favored, and both
statutes will be permitted to stand
if it can be done upon any reasonable
construction. Decker v. Deimer, 229
Mo. 296, 129 S. W. 936, loc. cit. 948;
Gasconade County v. Gordon, 241 Mo. 569,
145 S. W. 1160, loc. cit. 1163; State
ex rel. Karbe v. Bader, 336 Mo. 259,
78 S. W. 2d 835, loc. cit. 839. If
there be any conflict between two
statutes dealing with the same com-
mon subject matter, the statute which
deals with it in a minute and particular
way will prevail over one of a more gen-
eral nature; and the statute which takes
effect at the later date will also usually
prevail. Measured by both of these last
mentioned rules, the provisions of the
'Small Loan Laws' prevail over those of
the interest laws. * * * * *

CONCLUSION

In the premises we are of the opinion that the collector of revenue in a county of the second class is entitled to receive for his services the salary provided in Section 52.420, MoRS, Cum. Supp., 1953, and that he may not receive further or additional compensation arising from the collection of drainage or levee district taxes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:DA

COUNTY HIGHWAY ENGINEERS:: A person serving in the dual capacity
COUNTY SURVEYORS: : of county highway engineer and county
COUNTY OFFICERS: : surveyor in a county of the third class
FEES AND SALARIES: : is entitled to compensation as county
: surveyor while engaged in making surveys
: needed to lay out a road, but is not en-
: titled to the pay of a county highway
: engineer for the same service; the
: duties of a county highway engineer do
: not encompass the demolition of an
: abandoned courthouse, and, therefore,
: such person cannot be paid as county
: highway engineer for such work.



March 1, 1955

Honorable Max Oliver
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Mr. Oliver:

By letter of February 7, 1955, you requested an opinion of this office on the following questions:

"1. What is the salary that an individual employed both as County Highway Engineer and Surveyor draw while laying out roads and surveying same? Is he performing said duty in his capacity as Engineer or Surveyor?"

"2. Can an individual who is presently employed as Engineer be separately employed for an extra compensation to demolish an abandoned county building (Court House)? If so, can he draw his wages as Engineer while actually engaged in tearing down the Court House?"

Since Montgomery County is a county of the third class, this opinion is confined to counties of that classification.

Section 61.200 (all statutory citations herein are Revised Statutes of Missouri, 1949, unless otherwise indicated) permits the appointment of the county surveyor as county highway engineer. That section reads:

"The county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by

Honorable Max Oliver:

sections 61.170 to 61.310; and when so appointed, he shall receive the compensation fixed by the county court, and such fees as are allowed by law for his services as county surveyor; provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

The compensation for a county highway engineer of counties of the third class is set by Section 61.190.2, RSMo Cum. Supp. 1953. That section reads:

"2. In all counties of the third and fourth class the county highway engineer shall receive as compensation an amount fixed by the county court, for each day he shall actually serve as county highway engineer. The amount so fixed shall not exceed ten dollars per day in counties of class three nor eight dollars per day in counties of class four. All such compensation shall be payable monthly out of the county treasury."

County surveyors are compensated through fees. Section 60.110, RSMo Cum. Supp. 1953, provides the schedule of fees to which county surveyors are entitled. That section provides:

"County surveyors in counties of the third and fourth class shall be allowed fees for their services as follows:

For calculating the quantity of land in each survey when called upon by any party, the sum of thirty cents for each

Honorable Max Oliver:

distance contained in the boundary of said survey.

For every survey actually made not to exceed \$20.00 per day and the further sum of one cent for every chain lineal measure above one hundred chains.

For calculating the quantity of each division made in a tract of land, town lots excepted

1.50

For making each plat

2.00

For recording a plat and certificate

1.00

For every copy of a plat and certificate . .

1.00

For traveling to the place of survey and returning, for every mile

.08

For ascertaining and planting each corner .

2.00

For recording each certificate

2.00

For each day's attendance as a witness . . .

5.00

For delivering depositions to the recorder .

.70

For each day actually engaged in serving as a member of the county board of equalization

5.00".

The primary duty of county surveyors is set forth in Section 60.120. That section reads:

"The county surveyor shall, within ten days, when called upon, survey any tract of land or town lot lying in his county, at the expense of the person demanding the same; provided, that his legal fees are first tendered, or that he and his deputies are not engaged in executing previous orders of survey."

The primary duties of county highway engineers are set forth by Section 61.220 and Section 61.230. Those sections provide:

"The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges,

Honorable Max Oliver:

No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

"The county highway engineer shall personally, or by deputy, inspect the condition of the roads, culverts and bridges of each district as often as practicable, and, upon the written complaint of three freeholders in any such district, of the bad or dangerous condition the roads, culverts or bridges of such district, or of the neglect of duty by any road overseer of any such district, or of neglect of any contractor on roads let by contract, it shall be the duty of the county highway engineer to at once visit said road and investigate the complaint, and, if found necessary, to at once cause such road to be placed in good condition."

We conclude from the above statutes that it is not the duty of a county highway engineer to make surveys needed to lay out roads. We further conclude that when the officer is engaged in surveying proposed roads, he is entitled to the compensation provided for county surveyors. However, a person serving in the dual capacity of county surveyor and county highway engineer is not entitled to the compensation of both offices for the same service performed. This office rendered on December 22, 1953, an opinion (copy enclosed) to Honorable George Henry, Prosecuting Attorney of Newton County, holding that county highway engineers are entitled to pay only for those days on which they actually perform some duties of the office, and that the county court has broad discretion in determining on any particular day whether the

Honorable Max Oliver:

county highway engineer has devoted sufficient time to his duties to earn his daily pay.

In answer to your second question, we conclude that the demolition of an abandoned courthouse is not within the statutory duties of a county highway engineer. Therefore, the county highway engineer cannot be paid as such for those services under the principles laid down in the Henry opinion, supra.

CONCLUSION.

In the premises, therefore, it is the opinion of this office that a person serving in the dual capacity of county highway engineer and county surveyor in a county of the third class is entitled to compensation as county surveyor while engaged in making surveys needed to lay out a road, but is not entitled to the pay of a county highway engineer for the same service. It is further the opinion of this office that the duties of a county highway engineer do not encompass the demolition of an abandoned courthouse, and, therefore, such person cannot be paid as county highway engineer for such work.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

Enc:

Copy of opinion to Mr. George Henry, Dec. 22, 1953.

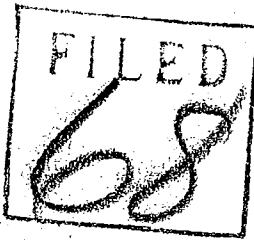
LEVIES:

COUNTY HEALTH CENTER:

RATES OF LEVY:

TAXATION:

Senate Bill No. 286 requires the lowering of the levy voted for the establishment of a county health center; the proper body to lower the levy is the county court.



August 15, 1955

Honorable W. H. S. O'Brien
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

This is in response to your request for opinion dated July 21, 1955, which reads as follows:

"The Chairman of the Board of Trustees of the Jefferson County Health Department has this day specifically requested that I submit two questions to you for the purpose of clarifying the responsibility of the Board of Trustees of the Jefferson County Health Department with respect to certain provisions of Senate Bill #286 passed by the 68th General Assembly and recently signed by the Governor.

"The questions posed are as follows, to-wit:

"1. Does Senate Bill No. 286, passed by the 68th General Assembly require that the levy, established by a vote of the people for the establishment and operation of a health center, be lowered.

"2. If the answer to the above is yes, does the order for a reduction of the levy emanate from the Board of Trustees of the Jefferson County Health Department or does it emanate from some other source."

In regard to your questions, Section 205.010, RSMo. 1949, should first be noted:

Hon. W. H. S. O'Brien

"Any county, subject to the provisions of the constitution of the state of Missouri, may establish, maintain, manage and operate a public health center in the following manner: Whenever the county court shall be presented with a petition signed by at least ten per cent or more of the qualified voters of the county, as determined by the number of votes cast for governor at the preceding general election, asking that an annual tax not in excess of ten cents on each one hundred dollars of the assessed valuation of property in the county, be levied for the establishment, maintenance, management and operation of a county health center and the maintenance of the personnel required for operation of the health center, the county court shall submit the question to the qualified voters of the county at the next general election to be held in the county or at a special election called for the purpose, the county clerk giving notice, published once each week for two consecutive weeks prior to such election date, in one or more newspapers published in the county, if any such be published, and if not so published, by posting written or printed notices in each township of the county, fourteen days prior to the election date, which notices shall include the text of the petition and state the rate of tax to be levied annually thereafter upon the assessed property of the county."

Senate Bill No. 286 requires as follows:

"Whenever the assessed valuation of real or personal property within the county has been increased by ten per cent or more over the prior year's valuation, either by an order of the state tax commission or by other action, and such increase is made after the rate of levy has been determined and levied by the county court, city council, school board, township board or other bodies legally authorized to make levies, and certified to the county clerk, then such taxing authorities shall immediately revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. * * *"
(Emphasis ours.)

Hon. W. H. S. O'Brien

Senate Bill No. 286 further defines "rate of levy" to include "those rates which have been or may be authorized by elections for additional or special purposes."

An election to authorize the levying of a tax to establish a county health center is an election for a "special purpose." In answer to your first question, thus, it is our opinion that Senate Bill No. 286 does require that the levy be lowered.

Section 205.020, provides as follows:

"2. If a two-thirds majority of the votes cast at such election on the proposition so submitted, shall vote in favor of such tax, the county court shall proceed to levy and collect such tax and deposit same in the county treasury to the credit of the health center fund and such fund shall be expended as hereinafter provided."

Thus, the county court levies the tax after the authorization for it has been obtained by a special election. The levy by the county court is, of course, at the rate set by the voters of the county. To note Senate Bill No. 286 again, it provides that "such taxing authorities shall immediately revise and lower the rates of levy." The phrase "such taxing authorities" refers to the "bodies legally authorized to make levies," in this case the county court so authorized by the special election for the establishment of a county health center.

CONCLUSION

It is, therefore, our opinion that Senate Bill No. 286 requires the lowering of the levy voted for the establishment and operation of a county health center and that the proper body to lower the levy is the county court.

Yours very truly,

WLaB:mw

John M. Dalton
Attorney General

OSTEOPATHS:
ADVERTISEMENTS:

An osteopathic physician can ethically and legally use a sign, by first placing his name and the letters D.O. behind it on one line, and underneath the words "physician and surgeon", and it is not necessary that he include the word osteopathic before the word physician.

October 12, 1955

Honorable Max Oliver
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"I am writing concerning the legality of a sign which advertises an osteopathic doctor and reads as follows:

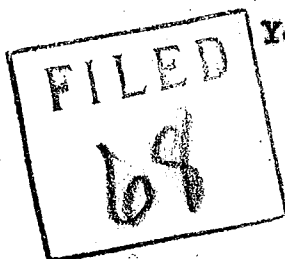
Name of Osteopath D. O.

Physician and Surgeon

"Should said sign read Osteopathic physician and surgeon in addition to the identification by the side of the name of the doctor?"

There are no provisions in the statutes of Missouri pertaining to the legality or illegality of a sign used by an osteopath, nor is there any statute pertaining to signs used by osteopaths. The only statute found which may have some bearing on your question is Section 337.070, RSMo 1949, pertaining to the revocation of an osteopath's license. Said section reads as follows:

"It shall be the duty of the state board of osteopathic examination and registration to carefully investigate all charges of immoral or illegal action of anyone to whom a certificate to practice osteopathy in this state has been issued, and after due notice of time and place being set and the accused given a chance to answer charges, and investigation having been made, and it has been proven beyond a reasonable doubt to at least four members of the board that the accused is guilty as charged of unethical conduct, and it shall



Honorable Max Oliver

be deemed unethical conduct to fail to designate himself or herself as an osteopathic physician or osteopathic surgeon or osteopathic physician and surgeon or any gross immorality or shielding anyone in any illegal practice, or is guilty of any criminal or illegal action, or is convicted of any felony, then said board shall revoke or suspend said certificate."

Thus, said section makes it unethical conduct on the part of an osteopath if he fails to designate himself as an osteopathic physician or osteopathic surgeon or osteopathic physician and surgeon. The question then presents itself whether the use of the letters D.O. behind an osteopath's name and the words physician and surgeon underneath his name on a sign is sufficient to designate him or her as an osteopathic physician and surgeon. Section 564.290, RSMo 1949, reads as follows:

"No person now or hereafter licensed in this state to practice medicine, surgery, dentistry, optometry, osteopathy, chiropractic, chiropody, or veterinary surgery, or any two or more of such professions, and no persons specifically permitted by law to practice the curing, healing or remedying of ailments, defects or diseases of body or mind with or without a license, shall use the prefix Doctor, or Dr. in connection with his name in any letter, business card, advertisement, prescription blank, sign or public listing or display of any nature whatsoever, without affixing thereto suitable words or letters clearly designating the degree held by such person or the particular type of practice in which such person is engaged which designation shall represent the profession such person is authorized to practice by license or privilege under the laws of this state."

(Emphasis supplied.)

This statute states that suitable letters clearly designating the degree held by an osteopath shall represent the profession such person is authorized to practice by a license or privilege of the laws of this state. Thus, this statute seems to mean that the letters D.O. behind a person's name would designate such person as a doctor of osteopathy, or an osteopath, and coupling therewith the words physician and surgeon in a sign, either after or under such name, would designate such person as an osteopathic physician and surgeon. Thus an osteopath can ethically and legally use a sign by

Honorable Max Oliver

having his name and the letters D.O. appear on the first line thereof and the words physician and surgeon below such and it is not necessary that the name, the letters, and the words osteopathic physician and surgeon be used on such sign.

CONCLUSION

An osteopathic physician can ethically and legally use a sign, by first placing his name and the letters D.O. behind it on one line and underneath the words "physician and surgeon" and it is not necessary that he include the word osteopathic before the word physician.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

Yours very truly,

JOHN M. DALTON
Attorney General

HLV:vlw/bi

SCHOOLS: Senate Bill No. 286, 68th General Assembly, requires reduction in total school levy but does not require that the rate for each purpose be reduced proportionately; in subsequent years board may file revised estimate at any time before original estimate is acted upon and thereby levy rate of taxation for each purpose less than but not in excess of that authorized by vote of the people.



November 17, 1955

Honorable W. H. S. O'Brien
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. O'Brien:

This is in response to your request for opinion dated October 4, 1955, which reads as follows:

"Clyde Hamrick, Superintendent of Schools has raised an issue concerning the reduction of school levies which I believe has not been answered by your prior opinions. The questions we wish to submit are as follows:

1. Does a School Board have authority after submitting a levy to the voters for their approval, setting forth the total amount of the levy and the amount for each fund, have the right when reducing the levy as required by the recent statute passed by the Legislature which requires reduction in the levy when the assessment is increased over 10%, to decrease some fund levies more than others are decreased.

2. Is the Board in the above circumstances authorized to calculate the total required decrease in the entire levy, and then reapportion it among the funds as they see fit without an equal percentage reduction of each fund voted on.

3. In future years (when the above mentioned statute will not be applicable) does the Board have authority after the voters have approved a levy where the levy shows the amount for each fund, to change the amount that certain funds might receive

Honorable W. H. S. O'Brien

by increasing one, and decreasing the other, so long as the entire levy remains the same.

"As information which might be helpful in answering the above 3 questions, Jefferson County was one of 26 counties effected by the recent tax ruling whereby 60% increase in assessments were ordered in said County. Levies from most School Boards being in excess of the statutory limits were submitted to the voters for their approval.

"In this submission the amount of each fund was to receive on the levy was set forth on the ballot as required by law.

"Your clarification of this issue will be appreciated."

The recent statute to which you refer, requiring a reduction in your school levy, is Senate Bill No. 286 of the 68th General Assembly. You have stated that Jefferson County is one in which a reduction of the school tax rate is required in order to comply with the terms of that act. Since other aspects of this bill have been considered in other opinions, we shall not set it out in full or consider any points other than the ones particularly applicable to your problem.

As we understand the phraseology of that bill and its purpose, the Legislature, by making this requirement that tax rates be reduced so as to produce substantially the same amount of taxes as previously estimated to be produced by the original levy, was concerned only with the aggregate levy imposed by a school district or other political subdivision. We do not believe that the act itself purports to say that the rates of levy for the various purposes, i.e., teachers, incidentals, etc., must of necessity be reduced in the same percentage.

Senate Bill No. 286 requires the taxing authority, in this case the school board, to reduce the rate of levy. The original levy is made by the submission of an estimate in accordance with Section 165.077, RSMo 1949 (Pope v. Lockhart, 299 Mo. 141, 252 SW 375; Lyons v. School Dist. of Joplin, 311 Mo. 349, 278 SW 74). We take it that the reduction must be made in the same manner, i.e., by the submission of a revised estimate based upon the increased valuation.

Honorable W. H. S. O'Brien

There is no question but that absent Senate Bill No. 286 a school board is authorized to submit a revised estimate if done before the original estimate is acted upon (State ex rel. Thorp v. Phipps, 148 Mo. 31, 49 SW 865). Senate Bill No. 286 does not purport to alter this authority but merely makes it mandatory that the board do so.

If the rate of levy were within the constitutional maximum which the board is authorized to make without a vote of the people, again there would be no question but that the board could make the reduction by way of a revised estimate in any manner that it might see fit just as long as the aggregate levy was reduced by the proper percentage. However, since these rates of levy were voted upon by the people, and in view of changes which have been made in the Constitution and applicable statutes since the decision of State ex rel. Thorp v. Phipps, supra, this proposition must be re-examined.

In State ex rel. Thorp v. Phipps, supra, the school board had submitted to the voters a proposition to levy one hundred cents on the \$100 assessed valuation of the district for school purposes, eighty-five cents of said one hundred cents to be applied for the teachers' fund and fifteen cents for the incidental fund. This proposition was approved by the voters.

However, subsequent thereto the board submitted an estimate calling for a levy of seventy cents for the teachers' fund, fifteen cents for the incidental fund and thirteen cents for the interest fund, a total levy of ninety-eight cents.

Contention was made that the vote authorizing the levy of one hundred cents, eighty-five cents for the teachers' fund and fifteen cents for the incidental fund, did not authorize a levy of ninety-eight cents, seventy cents for the teachers' fund, fifteen cents for the incidental fund and thirteen cents for the interest fund.

The court quoted from the applicable portion of the Constitution of 1875 and the statutes, and disposed of this contention in the following language, Mo. l.c. 36:

"The question which the Constitution required to be submitted to the taxpaying voters of the district, was, whether the rate of taxation for school purposes might be increased to one hundred cents on the \$100 and that is the only question the statute required to be submitted to their vote. Sec. 8005.

Honorable W. H. S. O'Brien

"That question was decided in favor of such increase in this instance, and authorized an increase of the rate to ninety-eight cents on the \$100, the same being within the limit of the authority granted. With the apportionment of the tax thus authorized the voters had nothing to do. That duty was devolved upon the board. Sec. 8000. And the authority to apportion the same as was done in the estimate in question was in no way affected by the suggestion of a different apportionment in the notice of the election. So that there is nothing in this contention."

At the time of this case all that was required by the Constitution and the statutes to be submitted to the voters was the question of increasing the aggregate levy to a certain amount. The court held that once the board had been authorized by the people to increase the total levy to the amount voted upon, the authority to apportion the tax was vested in the board and a suggested apportionment submitted to the people was not binding upon the board. This is no longer entirely true.

Now Article X, Section 11(c), Constitution of Missouri, 1945, as amended November 7, 1950, provides that in order to increase the rate of taxation above the constitutional maximum authorized without a vote of the people the rate and the purpose of the increase must be submitted to the voters for their approval. That section reads:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in

Honorable W. H. S. O'Brien

cities of seventy-five thousand inhabitants or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided, that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

The implementing statute, Section 165.080, RSMo, Cum. Supp. 1953, makes it clear that the rate of increase for each purpose must be stated separately and voted upon separately. That section provides that "such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, * * *." (Emphasis added.) It is further provided that "if the necessary majority of the qualified voters voting thereon, as required by article X, section 11 of the constitution, shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified * * *," (emphasis added) etc.

In other words, instead of going to the people for authority to make a blanket increase in the aggregate rate of taxation to be imposed upon the district, leaving the board with unbridled discretion as to the apportionment of the taxes, the board must now apply to the people for the authority to increase the rate of taxation for each purpose separately.

We believe the reasoning in State ex rel. Thorp v. Phipps, supra, at the present time is applicable to this problem insofar as it holds that the vote of the people merely authorizes a total

Honorable W. H. S. O'Brien

levy of a certain amount but does not require it; that the board may levy any amount within the limits authorized by the people. Now that the rate for each purpose must be treated separately, by the same token the board may levy any amount within the limits authorized by the people for each purpose.

Although for authority to increase the rate of taxation the rate for each purpose must be treated separately, for purposes of Senate Bill No. 286 the total levy may be treated as one "rate of levy," the reduction of which is thereby required. Therefore, the answer to all three of your questions is contained in the following conclusion:

CONCLUSION

It is the opinion of this office that Senate Bill No. 286 of the 68th General Assembly, where applicable, requires a reduction in the total rate of levy of a school district, but that in reducing such levy the board of education of such district is not required to reduce the rate voted by the people for each purpose proportionately; that in subsequent years the board may file a revised estimate at any time before the original estimate is acted upon and thereby levy a rate of taxation for each purpose less than but not in excess of that authorized by vote of the people.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

SHERIFFS', DEPUTIES'
MILEAGE:



The sheriff and his deputy may collect up to \$75. per month each for mileage in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense.

November 21, 1955

Honorable Don W. Owensby
Prosecuting Attorney
Buffalo, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"This office would like an opinion from your office concerning the amount payable to the sheriff and his deputy for mileage. It involves an interpretation of Section 57.430 R.S. Mo. 1949, as revised.

"The exact matter involved is whether or not the \$75.00 spoken of in the section is the limit that the county court is permitted to pay or is it \$75.00 to the sheriff and an additional \$75.00 to each of his deputies, of course providing that they by their statement to the court show that they actually traveled the miles necessary to be entitled to the full amount allowable."

Section 57.430, RSMo 1949, reads as follows:

"In addition to the salary provided in Sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, as actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed seven cents per mile, and actual expenses not to exceed seven cents per mile for each mile traveled, the maximum amount allowable to be seventy-five dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed,

Honorable Don W. Owensby

or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote.

"At the end of each month, the sheriff and each deputy shall file with the county court an accurate and itemized statement, in writing, showing in detail the miles traveled by such officer, the date of each trip, the nature of the business engaged in during each trip, and the places to and from which he has traveled. Such statement shall be signed by the officer making claim for reimbursement, verified by his affidavit and filed by him with the county court. Whenever claim for reimbursement is made by a deputy, his statement shall also be approved in writing by the sheriff.

"The county court shall examine every claim filed for reimbursement, and if found correct, the county shall pay to the officer entitled thereto, the amount found due as mileage."

A reading of this section convinces us that its meaning is that the total amount allowed is not \$75.00 for any one month. We believe, on the contrary, that a sheriff may be paid this amount for one month and that his deputies, one or more in number, may each be paid a like amount, if, of course, they certify that they have traveled in their official business the miles necessary to make up this sum. This would seem to be the reasonable construction to be put upon this section even if it were not that the plain wording of the section would seem to have the above meaning. At different times, according to different circumstances, the amount of miles necessarily traveled by the personnel of the sheriff's office will differ considerably, and different offices in different counties will vary greatly. If, therefore, the sheriff and his deputies are to be compensated for the mileage necessarily traveled by them, as seems to be the intent of the statute, the statute must necessarily have a considerable amount of elasticity.

CONCLUSION

It is the opinion of this department that the sheriff and his deputies may each collect from the county up to a maximum of \$75.00 per month for mileage in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly

John M. Dalton
Attorney General

HPW/b1/ld

PROSECUTING ATTORNEYS:
FEES:

The compensation provided for by Sec. 470.210 RSMo 1949, for prosecuting attorneys should be paid over by the prosecuting attorney to the county treasurer, and is not to be retained by the prosecutor.

December 16, 1955

FILED
68
Honorable Max Oliver
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I would request that your office render an official opinion concerning the right of the Prosecuting Attorney to retain the compensation allowed him by the Circuit Court under the provisions of Section 470.210 RSMo 1949, relating to escheats."

The above Section 470.210 reads:

"All moneys realized from the sale of any real estate, after paying all costs of such proceedings, and such compensation to the prosecuting attorney as shall be allowed by the court in which such order of sale is made, shall be paid by the sheriff into the state treasury within ninety days after the receipt thereof; and if said sheriff fail to pay said money into the state treasury within ninety days after the receipt thereof, he shall be proceeded against in the same manner as is provided in section 470.030. Moneys so paid into the state treasury shall be credited into the fund to be known and designated as 'Escheats,' and shall be withdrawn or disposed of as other moneys paid into the state treasury under this chapter."

Your question is whether the prosecuting attorney is permitted to retain the compensation mentioned above, or whether he shall pay it over to the treasurer of the county. It is our belief that the latter procedure is correct.

Section 56.340 reads:

Honorable Max Oliver

"The prosecuting attorney, in counties of the second, third and fourth classes, shall charge upon behalf of the county every fee that accrues in his office and receive the same, and at the end of each month pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, one of which he will immediately file with the clerk of the county court, and shall at the same time make out an itemized and accurate list of all fees in his office which have been collected by him, and one of all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the county court, stating that he has been unable, after the exercise of diligence, to collect the part unpaid, said report to be verified by affidavit, and it shall be the duty of the county court to cause the fees unpaid to be collected by law, and to cause the same when collected to be turned over to the county treasury."

We believe that the above is wholly inclusive of all compensation obtained by a prosecuting attorney, exclusive of his salary, and that it includes the compensation provided for by Section 470.210.

CONCLUSION

It is the opinion of this department that the compensation provided for by Section 470.210 RSMo 1949, for prosecuting attorneys, should be paid over by the prosecuting attorney to the county treasurer, and is not to be retained by the prosecutor.

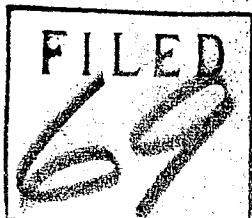
The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW/ld

SCHOOLS: Official action of directors of consolidated district in levying school taxes, if according to applicable statutes is valid, although attested by illegally appointed secretary of board.



November 30, 1955

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

This department is in receipt of your recent request for our legal opinion, and reads as follows:

"Would you please furnish this office with a written opinion as to the following:

"In view of the opinion rendered on April 26, 1951 and in view of Section 165.320 Revised Statutes of Missouri, 1949, where a consolidated district school board does appoint a teacher as secretary to the board and the teacher performs those duties without compensation, what, if any, is the result of such act?"

At our request the inquiry was clarified in a later letter reading as follows:

"In reply to your letter of August 29th my original inquiry of which you requested further information of August 3rd, arose due to the fact that last school year the Superintendent of schools of the Anderson Consolidated School District voluntarily served as Secretary and in such capacity attested all the acts of the board.

"There has now been some questions arise as to the legality of the school levy for the reason that the question has arisen as to his authority to attest such a levy inasmuch as he is prohibited from serving as Secretary of the board. However, such service was rendered voluntarily and there was no compensation paid him as such."

Honorable James L. Paul

From these letters we understand the inquiry to be whether or not the levy of the Anderson Consolidated School District was legally made, since the secretary of the board of directors who attested the board's action was a teacher of the district at such time and was prohibited by law from serving as secretary.

In an opinion of this department rendered to the Honorable Jermiah Nixon, Assistant Prosecuting Attorney, Jefferson County, Missouri, upon April 26, 1951, it was held that the board of a consolidated school district could not appoint a teacher as secretary of the board. No reference is made in the opinion as to whether the prospective secretary would or would not receive compensation for his services, nor do we believe this is important or necessary to a discussion of the question. Section 163.080, RSMo 1949, provides that the school board shall not appoint a teacher of the district as secretary, and it is the appointment under these conditions that is illegal, and not the fact as to whether or not the secretary will receive compensation.

In the instant case it is admitted that the appointment of the secretary is illegal, but that the secretary did not receive any compensation for his services. Applying the ruling of the above mentioned opinion to said sections, we wish to point out that the appointment of said secretary was illegal and in violation of Section 163.080, RSMo 1949, regardless of whether the secretary will or will not receive compensation. The applicable portion of said section reads as follows:

"* * * The board shall not employ one of its members as a teacher; nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the election of such person; nor shall the teacher serve as a clerk of the district. * * *"

The secretary might be proceeded against in quo warranto proceedings to oust him from office, if such proceedings are instituted in the court having proper jurisdiction.

The illegality of the appointment of the secretary and the proceedings which might be brought to oust him from office does not answer the inquiry, and is only incidental to it, hence we pass on to a discussion of such matter of inquiry.

Honorable James L. Paul

At the outset, we wish to call attention to Section 165.320, RSMo 1949, which provides for the organization of a city or town school board and reads as follows:

"Within four days after the annual meeting the board shall meet, the newly elected members, who shall be qualified by the taking of the oath of office prescribed by article VII, section 11, of the Constitution of Missouri, and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs. A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered, unless a majority of the whole board shall vote therefor. When there is an equal division of the whole board upon any question, the county superintendent of schools, if requested by at least three members of the board, shall cast the deciding vote upon such question, and for the determination of such question shall be considered as a member of such board. The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."

From the provisions of this section we note that the president and secretary of such a district shall perform the same duties and be subject to the same liabilities as presidents and clerks of boards of other districts, and of course the reference would include such officials of a common school district.

Section 165.220, RSMo 1949, prescribes the general duties of clerks of common school districts and reads in part as follows:

"The district clerk shall keep a record of the proceedings of all annual and

Honorable James L. Paul

special meetings of the qualified voters of the district also, the proceedings of the board of directors. He shall make copies of the election notices, contracts with teachers, certificates and all other papers relating to the business of the district, and securely keep the same. He shall transmit to the county superintendent, on or before the fifteenth day of July in each year, a report embracing the following items: * * *

From this section it appears that the duties of a secretary or clerk of a school board are clerical and ministerial in nature, and require him to keep the district's records, including the minutes of all board meetings. Section 165,320, supra, providing for the organization of the board, authorizes the board to appoint a secretary and treasurer, who may, or may not be a member of the board. Unless the secretary and treasurer is a member of the board he has no voice or vote on any propositions coming before the board and his sole duties are to keep the district records.

Section 165,323, RSMo 1949, requires the board to keep a corporate seal and reads in part as follows:

"The board shall keep a common seal with which to attest its official acts. * * *"

From the facts given in the opinion request we understand that the secretary was not a member of the board, and in order to answer the inquiry we must first consider whether or not the illegally appointed secretary was a de facto officer, and then what effect, if any, his action in attesting the tax levy made by the board will have upon such tax levy. The characteristics of a de facto school officer have been given in Vol. 78 C.J.S. at pages 876 and 877 as follows:

"One who has entered into the possession and assumed to exercise the function of a district or other local school office by virtue of an apparent election or appointment is an officer de facto, and more particularly if there is acquiescence on the part of the public or public authorities, and this is so although he is not eligible to hold the office, his election or appointment is irregular or illegal, he has

Honorable James L. Paul

failed to qualify, so by taking an oath or giving a bond, the district for which he purports to act has been irregularly or illegally organized, or he has vacated his office by removing from the district. However, if there has not even been the form of an election or appointment, and no acts with acquiescence for a sufficient length of time, a person cannot become a de facto officer by merely claiming title to the office. Moreover, another person or board cannot be regarded as a de facto school officer or board if there is already in possession of the office, and exercising the functions thereof, a de facto officer or board.

* * * * *

"The official acts of a de facto school officer, which a de jure officer would be authorized to do, are if performed in the prescribed manner, as valid and binding on the public and third persons as the acts of de jure officers, and authority to act cannot be questioned collaterally. This is true even though the acts are performed pending a contest or quo warranto proceeding which subsequently terminates in the ouster of the de facto officer from office. * * * "

In the case of State ex rel. v. Cartwright, 122 Mo. App. 257, the court discussed the powers of a de facto school district clerk, and at l.c. 264 and 265 said:

"We readily concede that the appointment of the district clerk should have been made by the board at a regular or special meeting thereof, (Pugh v. School District No. 5, 114 Mo. App. 688). And as this was not done, that Mr. Cartwright was not the district clerk de jure. But it does not follow that he must be regarded as a mere interloper and his acts in the discharge of his duties of the office held to be void because of the absence of his formal appointment. In a recent case, this court, speaking through ELLISON, J., quoted with approval the doctrine in State v. Carroll, 36 Conn. 449, that, "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the

Honorable James L. Paul

office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he seemed to be., etc.) (Usher v. Telegraph Co., (not yet reported).) The school board by a course of conduct extending over a period of years recognized Mr. Cartwright as district clerk, adopted and profited by his official acts and knowingly permitted the county officers and the general public to deal with him as a legal officer. These facts constituted him such officer de facto and the enumeration taken and filed by him in 1905 in the usual way and in compliance with the requirements of the statute must be deemed to have been authorized by the school board. * * *

The neglect or failure of a secretary to perform his duties in keeping the minutes of a school board meeting which was actually held, does not affect the legality of the board's proceedings, as declared in the case of Lowland School District v. Woolridge, 216 S. W. 2d 549 the court said:

" * * * The duties of the secretary of the board were nearly clarified, and the statute in reference to the performance of his duty is directory. Hudgins v. Mooresville Consolidated School District, 312 Mo. 1.c. 10, 278 S.W. 769. We find that the basis of appellants' contention rests wholly upon the technicality that the clerk failed to record the minutes of the board's proceedings in reference to calling the special election. Such contention cannot be approved as will later appear.

* * * * *

"In the case of Peter v. Kaufman, 327 Mo. 915, 32 S. W. 2d 1062, the sufficiency of a notice of an annual school election and for the levy and assessment of taxes

Honorable James L. Paul

for school purposes was involved. In discussing the matter the court, 327 Mo. on page 922, 38 S. W. 2d on page 1064 says: 'A. Raaf, who signed and posted up these notices, was shown to be the regular secretary of the board. It is true that the minutes of the board meeting on March 1, 1927, do not show a formal order of the board directing the secretary of the board to post these notices, prescribing what the notices should contain, but we decline to hold that this is a fatal defect.' Applicable and pertinent expressions are also found in the case of Breuninger v. Hill, 277 Mo. 239, 253, 210 S.W. 67. An election was held to incur bonded indebtedness for road purposes. Mere irregularities in the proceedings, such as the failure of the county board to enter of record an order directing the clerk to give notice of the supplemental registration, did not invalidate the proceedings. Attention is directed to what is said on page 253 of the opinion in 277 Mo., on page 71 of 210 S.W. In the present proceedings there was substantial compliance with the applicable statute, and that is all the law requires."

Again in the case of Hudgins v. Consolidated School District, 312 Mo. 1, a school board election was attacked upon the grounds that the proceedings were illegal because the school board appointed a clerk pro tem to act in place of the regular clerk in posting notices of the election ordered by the board. The court held this to be an irregularity in no wise affecting the validity of the bonds, since such bonds had been authorized by more than the two-thirds majority of qualified voters required by the statute. In view of the foregoing it is apparent that the illegally appointed secretary was a de facto and not a de jure officer. As such, his official acts would be as binding upon the district as if he were a de jure officer, provided the official acts performed by him were authorized by statute.

We have previously called attention to statutes prescribing the general duties of a secretary or clerk of a school district, which are clerical in nature, and have to do with keeping records of the district. We have also called attention to Section 165.323, supra, requiring, among other things, that the board shall keep a corporate seal with which to attest its official acts. The actual attestation referred to would be the duty of the clerk since he must keep the minutes of the board meetings and other records of the district. It is our thought that the de facto

Honorable James L. Paul

secretary's action in attesting the tax levy made by the board (which levy we assume to be in accordance with the statutes authorizing such levies) to be valid. The mere fact that such duty was performed by an illegally appointed secretary is immaterial, and would not render the levy thus made illegal.

CONCLUSION

It is therefore the opinion of this department that the official action of the board of directors of a consolidated school district in levying school taxes, if made in accordance with the applicable statutes is valid, although an illegally appointed secretary of the board attested said board's action.

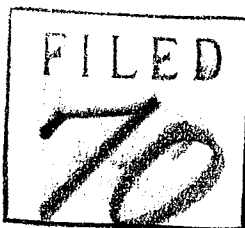
The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC:ma:hw

LOTTERIES: : A plan proposed to be operated where an individual
: operates an excursion boat, afternoons and evenings,
: and a charge of \$1.25 per person is collected for
: each excursionist on each trip, and to increase
: the number of patrons, the admission charge to re-
: main the same, there is added a bingo game on the
: afternoon trip at which prizes would be won and
: awarded, is a lottery.



March 17, 1955

70

Honorable Hugh Phillips
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Mr. Phillips:

Complying with your recent request this will be the opinion of this office as to whether the game of "bingo" if operated by an individual according to the plan proposed by such individual in conjunction with his excursion boat business in your county, constitutes a lottery, the scheme and plan of operating said game being submitted to you by the proposed operator as is described in your letter. Your request for the opinion of this office reads as follows:

"A man in this county operates an excursion boat with approximate capacity of a hundred persons. For the past several years, the admission for rides, both afternoon and evening, was \$1.25 per person including tax. As a business stimulant for the afternoon trips, admission to remain the same, he would like to add free bingo game with prizes totalling seven or eight dollars. As I stated, there would be no change in his old prices and no reduction for those who do not care to play the bingo game. He would continue to maintain the same entertainment and amusements he has had in the past.

"My first impression was that it came close to not being lottery since it was all free and the element of consideration was eliminated. On the

Honorable Hugh Phillips:

other hand, the admission price for the excursion ride could be considered as consideration and the fact that those who did not play bingo received no refund was not a distinguishing factor.

"The man who talked to me on this is a reputable citizen and desires to be well within the law; on the other hand, if possible, he would like very much to have this added attraction. I will appreciate any comments your office can give me on this."

Section 39 of Article III of the Constitution of Missouri, 1945, prohibiting lotteries, states:

"The general assembly shall not have power:

* * * * *

"(9) To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; ".

In compliance with such constitutional mandate the General Assembly of this State long ago enacted a statute, and there is in force and effect now, Section 563.430, RSMo 1949, prohibiting the creation and operation of a lottery, with a severe penalty for its violation. This section reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice

Honorable Hugh Phillips:

thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

The Supreme Court of Missouri in State ex inf. McKittrick vs. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S.W. (2d) 705, held that there must be present to constitute a lottery the three elements of "consideration"; "prize"; and "chance". The Court, 110 S.W. (2d), 1.c. 713, there said:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance.
* * *."

When these three elements combined are present in the operation of an enterprise, according to such rule of the Supreme Court, the project is a lottery.

Your request states that an admission charge of \$1.25 is collected from each excursionist making the trip for both the afternoon and evening trips; that the admission price would remain the same, but as a business stimulant for the afternoon trip a free "bingo" game would be provided with prizes totaling \$7.00 or \$8.00, presumably in cash; that there would be no deduction in the admission price for those of the excursionists who do not participate in the "bingo" game. We have here the following factual conditions, as recited in the request: First, the admission charge for each excursionist none of whom would be present for the boat ride or for the "free" "bingo" game if they did not, each of them, pay the admission price for the afternoon excursion ride. Not all of them

Honorable Hugh Phillips:

perhaps would participate in the bingo game, but they would, each and all, be eligible so to do, and some of them would participate in the game and others would not. The admission price paid for the trip and the privilege of playing the game would act as the "consideration" for the participation in the bingo game for those who wanted to and would take part in the game. It is plain, therefore, that the element of "consideration" would be present in the movement leading up to and resulting in participation in the game. This view is supported by the text in 38 C.J., page 291, in speaking of what constitutes "consideration" in a lottery game. The text states:

"The consideration may be money or other thing of value. The consideration need not be great. It has been held that the rule as to consideration does not mean that a scheme will be held a lottery only where money is directly given for the right to compete, but that it is only necessary that the person entering the competition shall do something or give up some right, or that some benefit may accrue to the person conducting the scheme. Other authorities hold that the payment directly or indirectly of money or other valuable thing for a chance is necessary to constitute consideration, and schemes under which some other act was required of the competitors have been held not to involve consideration. It does not affect the validity of the consideration that it was given, not simply for the chance of a prize, but also, and possibly chiefly, in return for merchandise or other advantage to the chance holder."

A Vermont case decided by the Supreme Court of that State, pertinent and persuasive on what is necessary as a consideration in a lottery is *State vs. Wilson*, 196 Atl. 757. The Court on this question, 1.c. 791, said:

"* * * Where a promoter of a business enterprise, with the evident design of advertising

Honorable Hugh Phillips:

his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes."

We have thus seen that in the proposed project there would exist the necessary element of "consideration" moving to the operator for providing the place, the opportunity and the means whereby the game of bingo may be played by any or all of his patrons who desire so to do by reason of the excursion charge paid to him by such patrons.

We will now ascertain if the second element necessary to constitute a lottery, the element of "prize", would be provided and exist if the proposed plan of adding the bingo game to the excursion as a means of increasing business is carried out as planned. We are not left to any uncertainty or speculation on this question by the individual who states the facts of his plan to add the game of bingo to the afternoon excursion trip. The request clearly states that the purpose and intention of the said individual is that he, the individual, proposes "as a business stimulant for the afternoon trips, admission to remain the same, he would like to add free bingo game with prizes totalling seven or eight dollars."

The person proposing to operate said bingo game on the said afternoon excursion trips states as facts that prizes for the said games will be provided and paid by the promoter to those of such excursionists on the afternoon trips who play in the bingo game and become winners.

We therefore deem it unnecessary to further cite facts or to cite and discuss authorities on the question

Honorable Hugh Phillips:

of the existence of the element of "prize" in the undertaking proposed. If the plan is carried out, it is disclosed by the plan itself, and is admitted, that prizes would be won and awarded. The excursion ride and the proposition to carry on the bingo game, in connection therewith, with the money prizes as part of the game, would satisfy the terms of the statute as to the existence of the element of "prize" in the game in pronouncing it a lottery. Consideration and prize having been conclusively shown to be included in the operation of the proposed bingo game excursion enterprise as two of the three necessary elements of a lottery, we will now give our attention to the third and remaining necessary element, that of "chance", required to be present in an enterprise, as so held by the Supreme Court, to constitute a lottery.

In our research on this subject for an appropriate definition of the term "chance", as a third necessary element required to be present to constitute a lottery, we find a clear statement of the meaning and effect of the word in the context of 11 C.J. 279. The word chance is there defined as:

"Possibility; hazard, risk, or the result or issue of uncertain and unknown conditions or forces; * * *."

We believe that the presence of chance in the scheme and plan described, if operated as proposed, as a necessary element to contribute to the plan being a lottery is obvious.

When the patron paid the admission charge for the trip, thereby becoming eligible to play in the bingo game the element of chance would necessarily be involved. The lack of knowledge on the part of the player whether his card would be completed earlier than those of the other players in the game so that he becomes the winner constitutes a chance, uncertainty and a hazard over which no one has any control whatever. This would meet the requirement of the statute that the element of chance would

Honorable Hugh Phillips:

be present with the two other necessary elements, consideration and prize, to constitute the proposed project a lottery. This proposition is frankly said by the proposed operator to be a plan to increase the afternoon excursion trip profits. To attain that result there are included in the proposed plan the three elements, consideration, prize and chance, held by our Supreme Court, in every case that has been before the court on a like state of facts and under the principles of law applicable thereto, to be a lottery.

Considering the facts as they are recited in the request and the authorities cited and quoted on the principles of law involved, it is apparent that the scheme and plan proposed would, if carried out, constitute a lottery.

CONCLUSION.

Considering the premises it is the opinion of this office that where an individual operates an excursion boat, making trips afternoons and evenings, and for each trip an admission charge of \$1.25 per person is collected by the operator, and in order to stimulate patronage on the afternoon trip the operator, the admission to remain the same, adds the game of bingo with prizes totalling \$7.00 or \$8.00, there would be present in the operation of the enterprise, consideration, prize and chance, and the project if so operated would constitute a lottery.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

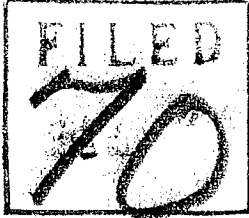
Yours very truly,

JOHN M. DALTON
Attorney General

GWC:irk

ASSISTANT PROSECUTING ATTORNEYS:
INCREASED PERSONNEL IN COUNTY
PROSECUTOR'S OFFICE:
COUNTY BUDGET LAW:

County court is bound by Sections 56.150 and 56.160, RSMo 1949, as amended by the 68th General Assembly; mandamus will lie to compel county court to pay the increased salary of prosecuting attorney's employees, and the salaries of the increased number of prosecuting attorney's employees.



September 20, 1955

Honorable Richard K. Phelps
Prosecuting Attorney
Jackson County
415 East Twelfth Street
Kansas City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You state your request as follows:

"As you know, the number of assistant prosecutors, except the First Assistant and Class 'A' Assistants, and also the number of investigators, clerks and stenographers in my office is determined in the manner provided for in Section 56.150 R. S. Mo. 1949. This section provides that the number of assistants, of investigators, of stenographers and clerks is to be determined by the Circuit Court en banc.

"The salaries of such personnel are fixed by the provisions of Section 56.160.

"At the last session of the Missouri General Assembly the salaries of all the personnel in the Prosecuting Attorney's office were increased by statute, approved by the Governor and effective for the month of September. This applies to everyone in my office except myself.

"In February of this year the circuit court en banc made an order fixing the number of my Class 'B' assistants at thirteen, the number of investigators at five, the number of stenographers at ten and no clerks.

Honorable Richard K. Phelps

"The County Court thereafter, by letter, notified me that it was not allowing me sufficient funds in my salary budget to pay this number of assistants, investigators and stenographers and by letter directed me not to exceed the expenditure in any one month of more than one twelfth of \$115,000.00, my salary budget for the year. The total amount of salaries to all assistants, investigators and stenographers had been approximately \$117,000.00 before the order of the Circuit Court increasing the number of assistants, stenographers and clerks.

"Rather than become involved in any legal action to compel the County Court to appropriate sufficient funds to carry out the Circuit Court's order we have gone along with limited personnel which we were able to keep under our decreased salary budget.

"For the remaining months of the year we will have enough money each month in our salary budget to pay our present personnel, even at the increased rates provided by the last General Assembly, but that would use our entire monthly budget with the exception of a few dollars. I would like to submit to you for an opinion the following questions:

"(1) Is the County Court bound by Section 56.150, particularly as it relates to the number of Class 'B' assistants as fixed by order of the Circuit Court's order en banc and if the Circuit Court sitting en banc does allow me an increased number of assistants (as it did) is the County Court obliged under the

Honorable Richard K. Phelps

law to provide for the payment of such additional personnel upon a submitted payroll?

"(2) Is it your opinion that mandamus would lie to compel the County Court to provide the money necessary to pay the salaries of such increased personnel?

"(3) Has the County Court, under its general budgetary powers, discretion to refuse to pay such personnel in spite of the order of the Circuit Court sitting en banc, if it should claim that in its judgment there is not sufficient revenue in the county treasury to make such payment?

"(4) Is the County Court required by the law enacted by the 1955 General Assembly increasing the salaries of personnel in the Prosecuting Attorney's office to provide the money for the payment of such increases in salaries, in addition to what money is already in the salary budget of the Prosecuting Attorney, if he should find it necessary to appoint additional assistants and additional stenographers, and may the County Court be required so to do by mandamus?"

On the 15th day of November, 1951, this department rendered an opinion to Honorable Edgar Mayfield, Prosecuting Attorney of LaCade County, a copy of which is enclosed, which we believe answers your inquiries to a considerable degree.

Naturally, there are different facts in the Mayfield case from those confronting you; for one thing, the class of the counties is different but we believe this makes no difference in the law in point. In the Mayfield case the circuit court raised the employee's salary; in your case the legislature, itself, raised it. In each case many facts are similar; in

Honorable Richard K. Phelps

each the circuit court either raised the salaries or increased the number of employees under statutory authority; in each case the circuit court's action followed the preparation of the budget; in both classes of counties the budget law contains specific directions for the preparation of the budget.

A study of Section 56.150, RSMo 1949, reveals that it contains features similar to those contained in Section 57.250, RSMo 1949, the section construed in the Mayfield opinion. Section 56.150 is specific in its provisions regarding the selection of assistants. It relieves the county court of the necessity of determining the number of such; leaves no discretion to be exercised by the county court, and leaves that court with ministerial duties only with respect to the numbers and the salaries.

Section 50.540 in no way conflicts because that section states that the county court shall "fix all salaries of employees other than those established by law."

* In our opinion the county court is bound by Section 56.150, both as it pertains to Class "B" assistants as fixed by the order of the circuit court, and as it pertains to the county court's obligation to provide for the payment of such additional personnel.

Your next question is: "(2) Is it your opinion that mandamus would lie to compel the County Court to provide the money necessary to pay the salaries of such increased personnel?"

As noted in our discussion of the first question, the county court is left with no discretion. It has been said that a county court has no powers except those granted or limited by law and, like all other agents, it must pursue its authority and act within the scope of its powers, and in auditing claims the county court acts merely as the fiscal or administrative agent of the county. Where the duty to pay the salary of a public officer or employee is purely ministerial, involving no element of discretion and there is no adequate legal remedy whereby payment may be enforced, mandamus is ordinarily the proper remedy to compel payment. 55 C.J.S., Section 72, page 125. See, also, 5 A.L.R. 572, 573.

Honorable Richard K. Phelps

You next ask "Has the County Court, under its general budgetary powers, discretion to refuse to pay such personnel in spite of the order of the Circuit Court sitting en banc, if it should claim that in its judgment there is not sufficient revenue in the county to make such payment?"

You will note in the Gill v. Buchanan County case, 142 S. W. (2d) 665, the question of insufficient revenue was raised. The court said that the failure on the part of the county court to budget for the mandatory obligations imposed by the legislature does not affect the county's obligation to pay them. As we pointed out, *supra*, in the instant case as well as in the Mayfield case, the action by the circuit court followed the preparation of the budget. It is our opinion that the act of the legislature delegating to the circuit court the power to increase the number of assistants is, after the circuit court fixes the number, the same as if the legislature itself had fixed the number. The situation seems to be no different from that in which the legislature itself raises the salaries. The salaries for the increased personnel would automatically be included in the county budget, even though the increases did not become effective until several months following the fixing of the budget.

In State ex rel Taylor v. Wade, 231 S. W. (2d) 179, which was a mandamus action to compel a county court to publish a financial statement at the end of the year, the court stated that the facts that there were no provisions in the budget for the expense of such publication and that there were no surplus funds available for the purpose were not decisive, and the court cited Gill v. Buchanan County. The legislature had directed that the statement be published. That amounted to a directive to the county court to include enough in the budget for that purpose.

In State ex rel v. Gilbert, 163 Mo. App., 1. c. 685, the court held that the county court was bound to issue a warrant for the payment of an officer's salary whether there was money in the treasury or not.

In the instant case it would seem that the action of the legislature imposed the obligation upon the court to amend the

Honorable Richard K. Phelps

budget when, during the year, changing circumstances so dictated. In the cases cited in which questions arose in third and fourth class counties the provisions of the County Budget Law were involved the same as in your case. Though the provisions of the County Budget Law are not as detailed for third and fourth class counties as for first class, nevertheless, we find nothing in the County Budget Law for first class counties that justifies a contention that insufficient revenue is an excuse for nonpayment of the salaries; we find nothing in the County Budget Law that gives rise to a discretion on the part of the county court in the matter of following or not following the legislative mandate.

Your fourth question is as follows: "(4) Is the County Court required by the law enacted by the 1955 General Assembly increasing the salaries of personnel in the Prosecuting Attorney's office to provide the money for the payment of such increases in salaries, in addition to what money is already in the salary budget of the Prosecuting Attorney, if he should find it necessary to appoint additional assistants and additional stenographers, and may the County Court be required so to do by mandamus?"

As pointed out above, it is our opinion that there is no difference in the obligation imposed upon the county court in the payment of increased salaries of the present personnel and the payment of the salaries of the increased personnel.

CONCLUSION

It is the opinion of this department that: (1) a county court is bound by Section 56.150, RSMo 1949, as it pertains to the number of Class "B" assistants as fixed by the order of the circuit court; (2) the county court is obligated to pay the salaries of the increased personnel ordered by the circuit court; (3) the county court is obligated to issue warrants covering such salary increases even though there is not money immediately available for such purpose; (4) mandamus will lie to compel a county court to provide the money

Honorable Richard K. Phelps

necessary to pay the salaries of increased personnel, and to compel the payment of increased salaries of present personnel; (5) a county court has no discretion under its general budgetary powers to refuse to pay either the salaries of increased personnel or the increased salaries of the present personnel.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

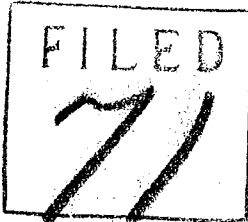
Very truly yours

John M. Dalton
Attorney General

RSN:lc

1 enclosure

COUNTIES:
CIRCUIT CLERKS: RECORDERS:
COUNTY COURTS:



Circuit clerk and ex-officio recorder of deeds in 3rd class county not permitted to retain fees collected under Section 451.150 and Section 193.350 RSMo 1949. Presiding judge of county court in third class county not to receive compensation under Sec. 3, H. B. 163, 67th General Assembly, for additional duties prescribed by such law if such duties are performed subsequent to December 31, 1954.

January 27, 1955

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Pinnell:

This opinion is rendered in reply to your request reading as follows:

"I would like an opinion from your office on two different and distinct matters. First, in an opinion dated January 10, 1955 and given to Bill Davenport of Christian County you stated that the Recorder of Deeds is entitled to a fee of \$1.00 for recording a marriage license and is further entitled to a fee of \$.50 for each Marriage Certificate filed with him providing that a proper report of same is made. I was wondering whether these fees may be retained by the Recorder individually or whether they are simply fees that must be turned over to the County by the Recorder. I might add that in this County the Offices of Circuit Court and Recorder are combined.

"Second, under Section 49.125 of the laws of 1953 the Presiding Judge is given certain additional duties. Under the original House Bill which is No. 163 the Presiding Judge was given \$300.00 per year additional compensation for these duties. I was wondering

Honorable W. H. Pinnell

whether since Section 49.125 does not specify special compensation and since the original House Bill did whether the Presiding Judge is no longer entitled to additional compensation for these duties. It may be that some other section provides further additional compensation but I have been unable to find same.

"Please let me have an opinion on this point also."

In the first paragraph of your inquiry, quoted above, you have informed that the offices of circuit clerk and recorder are combined in Barry County. Section 483.335 RSMo 1949, as amended, Missouri Revised Statutes, Cumulative Supplement 1953, provides, in part, as follows:

"1. The circuit clerk and recorder in counties of the third class wherein the two offices have been combined, shall receive annually for his services, the following:

* * *

(5) In counties having a population of seventeen thousand five hundred and less than twenty-five thousand, the sum of four thousand six hundred dollars;

* * *

2. Provided that the circuit clerk and recorder shall be allowed to retain, in addition to the sums above allowed, all fees earned by him in cases of change of venue from other counties."

Section 483.335, as quoted above, determines the compensation of a circuit clerk in class three counties where the offices of circuit clerk and recorder are combined. This statute is clear and unambiguous.

Section 59.260 RSMo 1949 provides as follows:

"It shall be the duty of the circuit clerk and recorder of counties of the third class,

Honorable W. H. Pinnell

wherein the offices shall have been combined, and in all counties of the fourth class, to charge and collect for the county in all cases every fee accruing to his office as recorder of the county to which he may be entitled under the law, and shall at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of the circuit clerk and recorder, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys, that shall have been collected by him as recorder during the month and required to be shown in such monthly report as herein provided, taking duplicate receipts therefor, one of which shall be filed with the county clerk, and every such circuit clerk and recorder shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county treasury as herein provided."

The marriage license fee of One Dollar which the recorder is obligated to collect under Section 451.150 RSMo 1949, and the recording fee of Fifty Cents to be collected by the recorder under Section 193.350 RSMo 1949, are well within the language of Section 59.260 RSMo 1949, quoted above, which makes it the duty of the recorder in counties of the third class, wherein the offices of circuit clerk and recorder have been combined, to charge, collect and pay over to the county treasurer all moneys that shall have been collected by such recorder.

Attention is next given to your second question concerning the compensation to be allowed the presiding judge of the county court of a county of the third class under the provisions of House Bill No. 163, Laws of Missouri, 1953, p. 381. This law is now found at Section 49.125, Missouri Revised Statutes, Cumulative Supplement, 1953. House Bill No. 163, supra, approved May 25, 1953, contained one additional paragraph not now shown in Section 49.125, supra, and it read as follows:

Honorable W. H. Pinnell

"3. For the duties imposed upon the presiding judge of the county court in counties of the third and fourth class by this section, he shall receive, in addition to the compensation now allowed him by law, the sum of three hundred dollars per year to be paid in equal monthly installments out of the county treasury. This subsection shall expire on December 31, 1954 and shall not be effective after that date. (Underscoring supplied).

The above quoted section 3 of House Bill No. 163, clearly discloses that such section 3 will have no force and effect after December 31, 1954. We find no additional statute providing compensation to the presiding judge of the county court for performing the additional duties outlined in paragraphs 1 and 2 of Section 49.125, supra, from and after December 31, 1954.

CONCLUSION

It is the opinion of this office that in counties of the third class where the offices of circuit clerk and recorder have been combined, the circuit clerk may not retain the one dollar fee for recording marriage licenses under Section 451.150 RSMo 1949, nor the fifty cent fee for recording marriage certificates under Section 193.350.

It is the further opinion of this office that the additional compensation allowed to the presiding judge of the county court in a county of the third class by Section 3 of House Bill No. 163, Laws of Missouri, 1953, p. 381, will not accrue for the additional services prescribed by such law if they are performed subsequent to December 31, 1954.

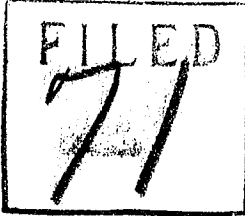
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

COUNTIES: County court authorized to publish
financial report in only one news-
COUNTY FINANCIAL REPORT: paper at county's expense.



February 7, 1955

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"The County Court of this county has this day requested me to secure your opinion on a matter relating to the publication of the annual financial statement.

"Provision 1 of MRSA 1949 Section 50.800 requires that 'On or before the first Monday in March of each year after the taking effect of this law the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county * * *'

"In a decision handed down by the Kansas City Court of Appeals in 1904, Pendleton v. Asbury, 78 S.W. 651, 1.c. 652, the court stated, 'The Legislature has by statute required that a publication of the county financial statement be made in "some" (one) newspaper printed in the county (section 6793, Rev. St. 1899), and has fixed the maximum rate for such publication * * *'

"From the foregoing it would appear that publication can be made in only one newspaper of general circulation. The Court and I are desirous of knowing your interpretation of this statute."

Honorable W. H. Pinnell

Section 50.800, RSMo 1949, provides, in part, as follows:

"1. On or before the first Monday in March of each year after the taking effect of this law the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending December thirty-first, preceding."

In the case of Pendleton v. Asbury, 104 Mo. App. 723, 78 S.W. 651, the Kansas City Court of Appeals had this statute under consideration. In that case two newspaper publishers in the same county had entered into an agreement whereby each would bid the maximum rate posed for publishing the county financial statement, and did so. The county court then proposed that each publish the report and receive one half the amount bid. The court held such agreement to be illegal and in its opinion stated, 104 Mo. App. 1.c. 728:

" * * * But the plaintiff contends that as the agreement provided for the publication of the county statement in both papers that a greater publicity was given to it, and it was therefore not against public policy.

"The Legislature has by statute required that a publication of the county financial statement be made in 'some' (one) newspaper printed in the county - section 6793, Revised Statutes - and has fixed the maximum rate for such publication - section 4688, Revised Statutes. The effect of the agreement here was to require the county court to pay for the publication in two papers instead of one, and to pay just double what it otherwise would have been required to pay. The combination agreement so entered into and executed was, it seems to us, but a fraudulent trick by which the parties thereto were enabled to appropriate to their own use out of the county treasury a sum of money to which they had no lawful right. * * *"

Honorable W. H. Pinnell

This holding of the court appears to us to construe Section 50.800 as to permit publication in only one newspaper. Such construction also appears to us to conform to the general principles regarding the authority of the county court. In the case of Lancaster v. County of Atchison, 352 Mo. 1039, 180 S.W. (2d) 706, 1.c. 708, the court stated in discussing the powers of county courts:

"Both parties to this suit agree that counties, like other public corporations, 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation - not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' Dillon on Municipal Corporations, 3rd Ed., Section 89. We have repeatedly approved this quotation. * * *"

Further in that case, the court stated, 180 S.W. (2d) 1.c. 709:

" * * * Where the statute (Section 8548) 'limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done.' Keane v. Strodman, 323 Mo. 161, 18 S.W. 2d 896, 898. See, also, Dougherty v. Excelsior Springs, 110 Mo. App. 623, 85 S.W. 112; Taylor v. Dimmitt, 326 Mo. 330, 78 S.W. 2d 841, 98 A.L.R. 995. In other words, there can never be an implied power given a county or other public corporation when there is an express power." (Emphasis ours.)

Applying these principles to the present situation, the Legislature has provided for the publication of the county financial statement in one newspaper. Although publication in additional newspapers might be effective to afford greater

Honorable W. H. Pinnell

publicity to such financial statement, nevertheless we feel that, the Legislature having prescribed the manner of publication, the court's authority to obligate the county in such regard must be exercised only in such manner and no authority may be implied for further or additional publication.

CONCLUSION

Therefore, it is the opinion of this office that the county court is authorized under Section 50.800, RSMo 1949, to publish the county financial statement at the county's expense in only one newspaper of general circulation published in the county.

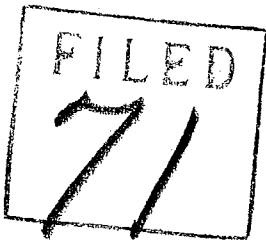
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

PUBLIC ROADS:
PRESCRIPTION:



Public road may be established when such road has been continuously used by the public for a minimum period of ten years, and upon which there shall have been expended public money or labor for such period to the extent that such road has been kept in substantial repair and condition for the public use and public travel.

October 3, 1955

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Section 228.190. (A L A. L. 1953 H. B. 40)

"Define legally established public roads as follows:

"All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads; and nonuser by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same.

"A matter has come up in this County in regard to this Section. The situation here is that there is a road crossing private land which has been continuously used by the public for more than ten years and has been maintained on one occasion by the expenditure of public funds through the use of a road grader or other public owned equipment.

"The particular road in question has been in reasonably good shape and has not required any other public maintenance within the past ten years. Assume, for the purpose of this question, that the road in question has been used for ten or more

Honorable W. H. Pinnell

years continuously prior to this date and assume further that the road has been 'worked' one time by public equipment. And assume further that the road has not required any public maintenance during this ten year period. In view of these facts I would like to know whether such circumstances mean that a public road had been created.

"In trying to determine the law on this matter I reviewed the cases including: Sellers v. Swehla, 253 S.W. (2d) 847, which in my opinion holds that public money be expended for ten 'consecutive' years, coupled with continuous use for a like period of time, and therefore, a public road could not be created by mere continuous public use for more than ten years and public maintenance for one year. Despite this conclusion I would like an opinion from your office as to whether a public road has been created if the facts hereinbefore set forth are true."

On May 24, 1954, this department rendered an opinion to Honorable Irvin D. Emerson, Assistant Prosecuting Attorney of Jefferson County, in which we construed Section 228.190, referred to by you. A copy of this opinion is enclosed and will, I believe, probably answer the question asked by you in your opinion request.

In the enclosed opinion we do not discuss the case of Sellers v. Swehla, 253 S.W.(2d) 847, referred to by you. That case does discuss what seems to be the only debatable situation set forth in your opinion request, to wit, the expenditure of public money for labor for the period of ten years' prescriptive use. The pertinent part of the Sellers opinion is found upon pages 851 and 852 and reads as follows:

"As to the expenditure of public money or labor upon the road in question, the evidence shows a probable use of a grader some five years before the trial and another use of a grader about the time the suit was filed, probably a short time before. There is also some evidence that 30 or 35 years ago certain persons worked out their poll taxes on this road. The evidence further shows that the plaintiff, Ralph Sellers, did some work on the road himself, part of it with the knowledge of the defendant. Taking this all as true and fully proved, we do not think it yet meets the requirement of the statute. This court, speaking through Judge Bradley, in State v. Kitchen, supra said:

Honorable W. H. Pinnell

"We are clearly of the opinion that all that is required by this statute with reference to the expenditure of public money or labor is that for the ten consecutive years of use sufficient public money or labor should be expended on the road to keep it in substantial repair and condition for the public use and public travel."

"The evidence in this case clearly shows that the road was not kept in substantial repair and condition for the public use, even by adding the labor of the plaintiff to the alleged operations of the public grader. It is not sufficient that the road be used for ten years continuously, but public money or labor must be expended on it 'for such period,* * *.' We think the evidence here wholly fails in that regard."

From the above, it seems clear that in order to satisfy the requirement as to public maintenance set forth in Section 228.190, supra, only so much expenditure of public money or labor is required as is necessary to keep the road in "substantial repair and condition for the public use and public travel."

In your letter you state that "The particular road in question has been in reasonably good shape and has not required any other public maintenance within the past ten years."

As we said above, it does not appear that any certain amount of public labor must be expended upon the road at any particular time in order to bring it within the purview of Section 228.190, supra, but that only so much as is necessary to keep the road in "substantial repair and condition" is necessary. Since you state that this was done, we believe that the requirement of the statute has been met and that a public road has been established under the state of facts submitted by you. We must, of course, bear in mind in this regard that there could very easily be a wide difference of opinion as to what constituted "substantial repair and condition." One person might believe that such condition existed, whereas, another person might believe that it did not. This would be a matter of general conclusion based upon the standards of maintenance of other roads in the same area.

CONCLUSION

It is the opinion of this department that a public road may be established when such road has been continuously used by the public

Honorable W. H. Pinnell

for a minimum period of ten years, and upon which there shall have been expended public money or labor for such period to the extent that such road has been kept in substantial repair and condition for the public use and public travel.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

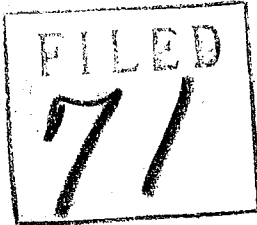
JOHN M. DALTON
Attorney General

HPW/ld

enc. Opn. to
 Irvin D. Emerson
 4-24-54

AGRICULTURE:
ICE CREAM:
FROZEN FOODS:

Review of proposed rules and regulations of the
Department of Agriculture implementing House Bill
No. 257 of the 68th General Assembly.



November 14, 1955

Mr. Paul L. Porter
Director of Dairy Division
Department of Agriculture
Jefferson Building
Jefferson City, Missouri

Dear Mr. Porter:

By letter bearing date of October 11, 1955, you have requested this office to review certain proposed rules and regulations of the Department of Agriculture implementing House Bill No. 257, enacted by the 68th General Assembly.

Pursuant to your request, these rules and regulations have been reviewed and all appear to be authorized by said House Bill No. 257.

The foregoing opinion, which I hereby approve was prepared by my assistant, Mr. Donal D. Guffey.

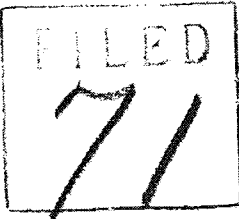
Very truly yours,

John M. Dalton
Attorney General

DDG:mw

OFFICERS:
ASSESSOR:
COUNTY HIGHWAY COMMISSIONER:

Duties of the office of county highway commissioner are not repugnant or incompatible with those of the county assessor and that one person may hold both offices at the same time.



November 22, 1955

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Pinnell:

Reference is made to your request for an official opinion of this office which request reads as follows:

"I would like an opinion from your office as to:
"Whether an individual may hold an elective county office and also hold the elective office of Road Commissioner."

At our request you have supplied us with the additional information that the elective county office to which you refer is the office of county assessor.

We are unable to find any constitutional or statutory provision which would prohibit one from holding the office of county highway commissioner and the office of county assessor at the same time. However, at common law incompatible offices could not be held by one person at the same time. In view of the fact that the common law doctrine is still in effect in Missouri we must, in answer to your question, determine whether the offices mentioned are compatible or incompatible.

The general rule as to when offices are considered to be incompatible is stated in 42 Am. Jur., page 936, as follows:

"* * *They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations

Hon. W. H. Pinnell

of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. There is no incompatibility between offices in which the duties are sometimes the same, and the manner of discharging them substantially the same. Nor are offices inconsistent where the duties performed and the experience gained in the one would enable the incumbent the more intelligently and effectually to do the duties of the other."

The common law doctrine of incompatibility of offices was stated and applied in the case of *State ex rel. Walker vs. Bus*, 135 Mo. 325, as follows:

"V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officer, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in *People ex rel. v. Green*, 58 N.Y. loc. cit. 304: 'Where one

Hon. W. H. Pinnell

office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

In order to apply the foregoing noted rule we must examine the statutes relating to the duties of the two offices in question to determine whether there is such an inconsistency in the functions of the offices so as to render them incompatible.

Section 230.010, RSMo 1949, creates in the several counties of the state a state highway commission to be composed of four members.

Section 230.020, RSMo 1949, provides for the appointment of four commissioners by the county court, which commissioners shall be not less than 25 years of age, bonafide residents of the county, and known supporters and advocates of a system of county highways constructed and maintained with a view to affording the greatest convenience to the greatest number of inhabitants of the county, in the matter of farm-to-market roads. Section 230.030, RSMo 1949, prescribes the duties of said county highway commission as follows:

"It shall be the duty of the county highway commission and said commission shall have the power to locate, lay out, designate, construct and maintain, subject to approval of the state highway commission, a system of county highways not exceeding in the aggregate at any given time one hundred miles in any county, by

Hon. W. H. Pinnell

connecting by the most practical route the several centers of population in the county, in such manner as to afford a connection with such of said centers of population as are not now located on any state highway with such state highway, and so as to afford, as nearly as may be done, a connection with county highways connecting the centers of population of adjoining counties, to the end that all parts of the county shall be connected with the state highway system as now laid out and designated, and that the inhabitants of the county generally shall have and enjoy a system of highly improved farm-to-market roads. If any part of this county one hundred mile highway system has been, or shall hereafter be taken over by the state highway commission and become a state highway, then an equal amount of new mileage, to take the place thereof, may be placed in the county one hundred mile system."

Other sections such as Sections 230.060, and 230.070, RSMo 1949, provide that certain county highways shall be under the exclusive control of the commission.

Section 53.010, RSMo 1949, provides for the office of county assessor.

Section 53.030, RSMo 1949, provides that every assessor shall take an oath "to assess all the real and tangible personal property in the county in which he assesses at what he believes to be the actual cash value."

Section 137.115, RSMo 1949, provides that the assessor of each county shall, between the dates of January 1 and June 1 of each year, proceed to make a list of all real and tangible personal property in his county and assess the same at its true value in money.

We believe that the foregoing statutory provisions relating to the principal duties of the office of road commissioner and the office of assessor and are sufficient to show that no incompatibility exists between said offices. The duties and functions of one office are not inherently inconsistent or repugnant to the other. Neither office is superior to the other nor does one office have supervision over the other. Therefore, the common law rule of incompatibility is not violated by one person discharging the duties of the two offices.

Hon. W. H. Pinnell

CONCLUSION

Therefore, in the premises, it is the opinion of this office that the duties of the office of county highway commissioner are not repugnant or incompatible with those of the county assessor and that one person may hold both offices at the same time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton
Attorney General

DDG:mw

COUNTY ASSESSORS:
COUNTIES:

Annual compensation of county assessor in third class county computed on fee basis until commencement of next year of his incumbency after effective date when county's classification changes from third class to second class, at which time he will receive an annual salary as provided by Sec. 53.120, RSMo. 1949. Such assessor's deputies to be compensated under Sec. 53.090 from date such assessor's compensation is changed.



January 27, 1955

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Pratt:

This opinion is rendered in reply to your recent request reading as follows:

"I have recently been requested to obtain an official opinion from your office as to the status of the assessor's office when the county classification changes from a third class county to a second class county, and the said change be made during a fiscal year of the assessor's term as follows:

"1. In that Clay County changed classification from a third to a second class County as of January 1st, 1955, and the Assessor's fiscal year being from September 1st of one year to August 31st of the next year and such change of classification being made during said fiscal year of the Assessor, will the Assessor, Deputies and Clerks compensation from January 1st, 1955 to August 31st, 1955 be based on the fee basis under which the current fiscal year was started as of September 1st, 1954 and ending August 31st, 1955?

"2. In that all work that has been done by the Assessor, Deputies and Clerks since September, 1954, was pertaining to 1955 assessment duties and "if it is held that the Assessor's compensation is under Class 2 salary as of January 1st, 1955," the Assessor would only receive compensation for eight months of a fiscal year and there-

Honorable Stephen R. Pratt

fore 'what provision is or will be made for compensation of the Assessor personally, for the four months of the current fiscal year from September 1st to December 31st, 1954?'

The term of office of a county assessor is set forth in the language of Section 53.010 RSMo 1949 which reads:

"At the general election in the year 1948 and every four years thereafter the qualified voters in each county in this state, except those under township organization, shall elect a county assessor. Such county assessors shall enter upon the discharge of their duties on the first day of September next after their election, and shall hold office for a term of four years, and until their successors are elected and qualified, unless sooner removed from office; provided, that this section shall not apply to the city of St. Louis."

Under the provisions of the foregoing statute we assume that the present assessor in Clay County was elected at the general election in November, 1952 and assumed his official duties on September 1, 1953, with a full four-year term not to expire until September 1, 1957.

In the case of State ex rel. Harvey v. Linville, 300 S.W. 1066, 318 Mo. 698, the Supreme Court of Missouri was considering a fact situation only slightly dissimilar to the facts appearing in your request for this opinion. In the cited case the compensation of the county official was automatically increased due to an increase in population, while in our present fact situation we find the county official's compensation being automatically changed due to an increase in assessed valuation in the county.

The following language from State ex rel. Harvey v. Linville, 300 S.W. 1066, 318 Mo. 698, 1.c. 702, will determine the principal issue in this opinion:

"* * *Annual salary' as used in said Section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We

Honorable Stephen R. Pratt

conclude further that 'annual' as applied to salaries means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the first day of April each year."

Under the rule announced in the foregoing quotation the county assessor of Clay County will have his annual compensation computed on a fee basis until the commencement of the next year of his incumbency commencing after the effective date when the county's classification changes from third class to second class, at which time his annual compensation will no longer be computed on a fee basis, but on a salary basis as provided in Section 53.120, RSMo 1949. It necessarily follows that the compensation of the county assessor's deputies will, beginning with the assessors first year of incumbency after reclassification of Clay County, be subject to the rule applicable to second class counties and found at Section 53.090, RSMo 1949.

CONCLUSION

It is the opinion of this office that the county assessor of a third class county will have his annual compensation computed on a fee basis until the commencement of the next year of his incumbency commencing after the effective date when the county's classification changes from third class to second class, at which time his annual compensation will be computed on a salary basis as provided in Section 53.120 RSMo 1949 and compensation of such county assessor's deputies will, beginning with the assessor's first year of incumbency after such county's reclassification be subject to the rule applicable to second class counties and found at Section 53.090 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JL:OM:mwr

JOHN M. DALTON
Attorney General

COUNTIES: Sheriff of county whose classification changes from
SHERIFF: third to second class during his term shall not continue
to act as assistant probation officer nor receive compensation therefor after such change in classification.



February 16, 1955

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

Reference is made to the request for an official opinion of this office submitted by your assistant reading as follows:

"We request your opinion on the following question:

"Clay County, effective January 1st, 1955, changed in classification from a 3rd class county to a county of the 2nd class: The Clay County Sheriff began his term of office January 1, 1953, and, therefore, was half through his term at the time of reclassification of the County.

"By virtue of R.S. 1949, Section 211.455, Paragraph 2, the Sheriff of a 3rd class county was designated as assistant probation officer; Section 57.405 provided that he would be compensated in the amount of \$1,200.00 per year for performing the duties of such assistant probation officer. In a 2nd class county such office of assistant probation officer is not provided for.

"Our question, therefore, is whether the Clay County Sheriff will continue to be assistant probation officer as provided in the law pertaining to 3rd class counties and shall continue to be compensated as such, as provided by statute, until the end of his term even though the classification of the county changes from 3rd to 2nd class during his term, particularly in view of

Honorable Stephen R. Pratt

Section 48.060, R. S. 1949."

In the consideration of your opinion request, certain basic principles relative to public office and public officers must be kept in mind. With the exception of offices created under constitutional provisions, only the legislature has the power to create a public office as an instrumentality of government. See *State ex rel. Rosenthal vs. Smiley*, 263 S.W. 825, wherein the following appears:

"It is well settled that only the Legislature has the power to create a public office (other than a constitutional office) as an instrumentality of government, and this power it cannot delegate. *State v. Butler*, 105 Me. 91, 73 Atl. 560, 24 L.R.A. (N.S.) 744, 18 Ann. Cas. note 489. * * *"

It must be further observed that even though a public officer is appointed or elected for a particular office for a definite term, such office may thereafter be abolished prior to the expiration of such term, and if such is done the officer has no legal complaint and he thereafter ceases to hold the office. *State ex rel. Tolerton vs. Gordon*, 130 S.W. 403, 236 Mo. 142, and *Sanders vs. Kansas City*, 162 S.W. 663, 175 Mo. App. 367.

One further principle we also consider germane to the subject matter of your inquiry. That is the rule that a public officer is not entitled to compensation by virtue of any contract, express or implied. No vested right to such compensation having any of the characteristics of a property right rests in such public officer. We direct your attention to *Givens vs. Daviess County*, 17 S.W. 998, 107 Mo. 603:

"A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office. *Gammon v. LaFayette Co.*, 76 Mo. 675; *Koontz v. Franklin Co.*, 76 Pa. St. 154; *Fitzsimmons v. Brooklyn*, 102 N.Y. 536; *Walker v. Cook*, 129 Mass. 579; *Knappen v. Supervisors*, 46 Mich. 22; *City Council v. Sweeney*, 44 Ga. 465. In the absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his duties enlarged

Honorable Stephen R. Pratt

without the impairment of any vested right. State ex rel. v. Smith, 87 Mo. 158; City of Hoboken v. Gear, 27 N.J.L. 278; United States v. Fisher, 109 U.S. 143."

The foregoing discloses the complete control exercised by the legislature with respect to public offices created by such body subject to constitutional limitations.

Examining the provisions relating to counties changing from one classification to another, we observe the following statute relating to the public officers thereof. Section 48.050, RSMo 1949, reads as follows:

"Any elected county official whose office may be abolished or consolidated with another office as a result of the change of the county from one class to another shall continue to hold the office to which he was elected for the term for which he was elected. Any office which may be established as a result of the change of the county from one class to another shall be filled in accordance with the provisions of the law relating to the filling of vacancies for such office."

Giving due recognition to the effect upon the office of sheriff of Clay County by virtue of the transition of such county from one of the third to one of the second class, it will be observed that the office of such official is ~~neither~~ ^{not} "abolished or consolidated with another office." Consequently, the quoted statute is inapplicable with respect to such official.

We note in your letter of inquiry a reference to Section 48.060, RSMo 1949. This statute reads as follows:

"The provisions of this chapter, enacted to conform the law of this state to the provisions of section 8 of article VI of the constitution of 1945, are hereby declared to be dependent upon the constitutional authority uniformly to graduate the compensation of county officers within the classes as designated herein pursuant to the provisions of section 11 of article VI of the constitution of 1945. The failure of the general assembly to possess such

Honorable Stephen R. Pratt

power shall have the effect of making inoperative the provisions of this chapter."

We have examined the decisions of the appellate courts of this state, and we do not find that the power of the General Assembly in regard to the matters referred to in the quoted statute has ever been questioned. Inasmuch as a great many statutes adopting graduated compensation of county officers within the several classes of counties have been passed and in effect since 1945, we necessarily must accord to such legislative enactments the presumption of constitutional validity to which they are thereby entitled.

What has been said heretofore is not to be construed as the expression of an opinion that the sheriff of your county will be limited to the salary paid him as an official of a third class county for the remainder of his term, inasmuch as it is our belief that subsequent to the effective date of the transition he will be entitled to the compensation and other emoluments incident to being a sheriff of a county of the second class. Even though such change in compensation may result in an increase in compensation to such official, it will not have the effect of violating the provisions of Section 13, Article VII, of the Constitution, which reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

To this effect see State ex rel. Mo s v. Hamilton, 260 S.W. 466, 303 Mo. 302, and State ex rel. Harvey v. Linville, 300 S.W. 1066, 318 Mo. 698. In both of these cases county officials were held to be entitled to increased remuneration based upon changes in county populations subsequent to their elections.

CONCLUSION

In the premises, we are of the opinion that a sheriff of a county of the third class who, by virtue of such office, acted as assistant probation officer for such county, will not be required to act as such assistant probation officer or be entitled to receive compensation therefor subsequent to the transition of such county to one of the second class.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

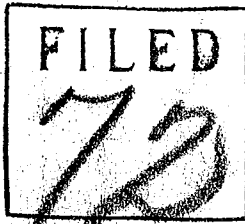
Yours very truly,

WFB, Jr.:da

JOHN M. DALTON
Attorney General

CITIES OF THIRD CLASS:
COMMISSION FORM OF GOVERNMENT:
CITY LIBRARIES:

Sections 78.060 and 78.070, RSMo 1949,
control the administration and management
of city libraries in cities of the third
class operating under the commission form
of government.



March 3, 1955

Mr. Paxton P. Price
State Librarian
State Office Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion
reading as follows:

"This office would truly appreciate an
opinion from your department on the fol-
lowing questions:

"1. The Revised Statutes of Missouri,
1949, Sections 78.010 to 78.420 cover
the operation of a third class city
government under a Commission Form and
makes mention of the city public li-
brary. Sections 182.140 to 182.300
cover the establishment, management and
operation of city libraries. Are these
two different sets of laws, applying to
a given third class city organized under
a commission form of government, in con-
flict with each other as they apply to
the that city's public library? Which
law holds precedence?

"2. Can a city public library be estab-
lished and operated under the conditions
outlined in Sections 182.140 to 182.300
in a third class city that is organized
under the Commission form of government?

"Thank you in advance for the prompt
handling of this request."

Mr. Paxton P. Price

It appears that two of the statutes comprising the scheme for the adoption and exercise of the commission form of government in cities of the third class are inconsistent with the general statutes relating to the management and administration of city libraries found as Sections 182.140 to 182.300, inclusive, RSMo 1949.

We direct your attention to the following portion of Section 78.060, RSMo 1949:

"The council * * * shall also possess and exercise all executive, legislative and judicial powers and duties now had and exercised by * * * board of library trustees in all cities wherein such boards now exist or may be hereafter created.
* * * "

also, to the following provisions of Section 78.070, RSMo 1949:

"* * * The council shall at said first meeting, or as soon as practicable thereafter, elect by majority vote the following officers: * * * three library trustees * * *."

These statutes, being special in nature, and treating the administration and management of city libraries in cities of the third class, operating under the commission form of government, are, in our opinion, exceptions to the general statutes relating to such libraries. We, therefore, believe that they are controlling in such cities with respect to their subject matter.

CONCLUSION

In the premises, we are of the opinion that the administration and management of city libraries in cities of the third class operating under the commission form of government are controlled by the provisions of Sections 78.060 and 78.070, RSMo 1949, insofar as the subject matter of such statutes is applicable.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

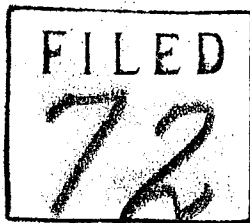
Very truly yours,

JOHN M. DALTON
Attorney General

WFB:DA

COUNTY AUDITOR:
COLLECTOR OF REVENUE:
LEVEE DISTRICTS:

Respective duties of county auditor and
collector of revenue in class 2 counties
in regard to levee district taxes.



April 18, 1955

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Attention: Mr. Gerald Kiser, Assistant Prosecuting Attorney

Dear Mr. Pratt:

Reference is made to your request for an official opinion
of this department reading as follows:

"We wish to inquire about the respective
duties of the County Auditor in Class 2
counties and the Collector of the Revenue
of the county with reference to levee and
drainage district taxes.

"Section 245.200 of the Revised Statutes
for 1949 imposes the duty of the Collector
of the Revenue to collect levee and drain-
age taxes and also provides that he give
a separate bond to the Supervisors of the
district. We think that means that he is
ex-officio collector of the revenue for
drainage and levee districts and that he
handles such collections, ex-officio and
not as a county officer.

"Section 55.190, Revised Statutes for
1949, provides that the collector shall
make a daily report to the auditor of
receipts and balances in his hands, and
also states, 'that he shall make a daily
report to the auditor of all other sums
of money collected by him from any source
whatsoever, and such report shall state
from whom collected and on what account,
which sums shall be charged by the auditor
to the collector.'

Honorable Stephen R. Pratt

"Section 55.161, Paragraph 1 (Sub-paragraph 1) provides that the auditor shall also have the extra duty of auditing moneys and funds belonging to any levee district organized and operating in such county.

"It appears from the foregoing statutes that the collector is required to make a daily report to the auditor, and that the auditor is required to charge the collector with the several sums daily reported by the collector to the auditor.

"We understand there is some discussion about the meaning of the applicable statutes and we think that in view of the fact that heretofore the collector has acted as ex-officio collector for the drainage and levee districts, the whole matter should be clarified by official legal opinion.

"In other words, must the county collector report to the county auditor each item of collection on drainage and levee district taxes, when he is merely ex-officio collector of those districts to whom he is required to give a separate bond? If the collector of the revenue is merely ex-officio collector for the levee and drainage districts, to each of whom he gives a separate bond, why should the county auditor be charged with auditing his accounts when they are not in any sense county funds? If, upon auditing the accounts of the collector for the benefit of the drainage and levee districts, the county auditor finds some discrepancies, would the county auditor report it to the county, to the board of supervisors or to the bondsmen?

"In our opinion, the whole matter is indefinite and uncertain and we think an official opinion as to the county auditor's duties with respect to the

Honorable Stephen R. Pratt

matters hereinabove stated, is necessary for the county auditor's guidance."

Section 245.200, RSMo 1949, referred to in your letter of inquiry, reads as follows:

"1. It shall be the duty of the collector of revenue of each county in which lands or other property of any levee district organized under sections 245.010 to 245.280 are situate, to receive the levee tax book each year and he is hereby empowered and it shall be his duty to promptly and faithfully collect the tax therein set out and to exercise all due diligence in so doing. He is further directed and ordered to demand and collect such taxes at the same time that he demands and collects state and county taxes due on the same lands and other properties. Where any tract or part thereof has been divided and sold or transferred, the collector shall receive taxes on any part of any tract, piece or parcel of land or other property charged with such taxes and give his receipt accordingly. The above and foregoing levee tax book shall be the warrant and authority of the collector for making such demand and collection.

"2. The said collector shall make due return of all levee tax books each year to the secretary of the board of supervisors of the aforesaid levee district, and shall pay over and account for all moneys collected thereon each year to the treasurer of said district at the same time when he pays over state and county taxes. Said collector shall in said levee tax book, verify by affidavit his said return. The said secretary shall each year, within ten days after the return of said collector is delivered to him, prepare and certify to said collector a levee back tax book containing the list of lands and

Honorable Stephen R. Pratt

other property so returned by said collector as delinquent, deliver the same to him and take his receipt therefor, and said collector shall proceed to collect such delinquent levee taxes and demand payment therefor in the same manner as herein provided for the collection of current levee taxes.

"3. Before receiving the aforesaid levee tax book the collector of each county in which lands or other property of the levee district are located, shall execute to the board of supervisors of the district a bond with at least two good and sufficient sureties in a sum that is double the probable amount of any annual installment of said tax to be collected by him during any one year, conditioned that said collector shall pay over and account for all taxes so collected by him according to law. Said bond after approval by said board of supervisors shall be deposited with the secretary of the board of supervisors, who shall be custodian thereof and who shall produce same for inspection and use as evidence whenever and wherever lawfully requested to do."

It is to be observed that under the quoted statute the duty of collecting levee district taxes has been directly imposed upon the collector of revenue of such county. It further provides for a bond conditioned upon the paying over and accounting for all taxes of the levee district so collected. This statute first appeared in the Laws of 1913, page 290, and has been unamended to this date.

Section 55.190, RSMo 1949, reads as follows:

"It shall be the duty of the county collector of revenue of each of such counties to make a daily report to the auditor of receipts and balance in his hands, and where deposited, and deliver to the auditor each day a deposit slip showing the day's deposit. The collector shall, upon receiving taxes, give duplicate numbered tax

Honorable Stephen R. Pratt

receipts, which the taxpayer shall take to the auditor to be countersigned by him, one of which the auditor shall retain, and charge the amount thereof to the collector. The collector shall also make a daily report to the auditor of all other sums of money collected by him from any source whatsoever, and in such report shall state from whom collected, and on what account, which sums shall be charged by the auditor to the collector. The collector shall, upon turning money over to the county treasurer, take duplicate receipts therefor and file same immediately with the county auditor."

Section 55.161, MoRS, Cum. Supp., 1953, reads, in part, as follows:

"In addition to all other duties imposed upon the county auditor in counties of the second class he shall have the following duties:

(1) He shall audit, examine and adjust all accounts of county officials and courts operating in such counties where there is an accumulation of moneys, taxes, fees, fines and miscellaneous public funds received from any and all sources by county officials and courts operating in such counties, and which are accumulated and intended for public purposes other than the general administrative functions of the county, provided that such extra duty of accounting is to be performed in the same manner as is now by statute prescribed for the general county administrative business. He shall also have the extra duty of auditing moneys and funds belonging to any levee district organized and operating in such county, also moneys to be disbursed to school districts organized and operating in such county, also moneys to be disbursed in the county for library, hospital, recreation, public health and civil defense purposes;

* * * * *

"

Honorable Stephen R. Pratt

The latter two statutes form a part of Chapter 55 relating to the office of county auditor. The confusion which apparently has arisen no doubt stems from the provisions of Section 55.161, RSMo 1949, quoted supra, by virtue of the incorporation therein of the last two sentences which we have underscored.

Under the plain language embodied in Section 55.190, RSMo 1949 quoted supra, the collector of revenue is required to make the daily report to the county auditor in the form therein mentioned. The language relating to the duties of the collector of revenue is definite and unambiguous and, therefore, no occasion arises for its construction. In the circumstances the rule declared by the Supreme Court in the case of Steggall v. Morris, 258 S. W. (2d) 577, from which we quote, l. c. 582, we believe to be applicable:

"In State ex inf. Rice ex rel. Allman v. Hawk, 360 Mo. 490, 228 S. W. 2d 735, loc. cit. 739 (8, 9), this court stated the rule thus: 'The language of the statute is clear and unambiguous, and we have no right to read into it an intent which is contrary to the legislative intent made evident by the phraseology employed.'"

Your further question, relating to whom reports of discrepancies found as a result of such audit should be reported, is answered, we believe, by the provisions of Section 245.200. Under that statute, as mentioned supra, the bond of the collector of revenue is conditioned upon the payment and accounting for, of all levee taxes. The same statute requires that such bond name the board of supervisors of such district as obligor. Therefore, any discrepancy should be reported to that body in order that appropriate legal action might be instituted against the defaulting officers and the sureties on his bond for the recovery of funds properly due the levee district.

CONCLUSION

In the premises, we are of the opinion that a collector of revenue in a county of the second class is required, with respect to taxes collected on behalf of such levee district, to report in detail to the county auditor of such county such collections.

We are further of the opinion that it is the duty of the county auditor in counties of the second class to audit the

Honorable Stephen R. Pratt

accounts of the collector of revenue of such county and of the treasurer of levee districts located therein for the purpose of ascertaining whether proper settlement has been made for all funds due such levee districts.

We are further of the opinion that in the event of discrepancies being found in such accounts, report thereof should be made by the county auditor to the board of supervisors of the levee district affected.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:DA

STATE BOARD OF COSMETOLOGY: 1. Fees collected by Board payable to Director of Revenue;
2. No prohibition against employee of Board discharging duties of an inspector and secretary at the same time if, in Board's discretion, action is conducive to efficient operation.

3. An officer of this state may authorize an increase in salary to an employee different from that listed in the official Manual.
4. Board may not grant bonuses to employees.
5. Employees of Board may travel beyond State and receive reimbursements therefor, if such expense is incurred in discharge of official duties, in matter in which government has an interest, and within appropriation provided for that purpose.

June 14, 1955

Miss Edna Marie Pray
President, Missouri State
Board of Cosmetology
420 West 11th Street
Kansas City, Missouri

Dear Miss Pray:

Reference is made to your request for an official opinion which request reads in part as follows:

"Should the checks and money orders sent to Jefferson City from Shop owners, School owners, operators, and instructors be made payable, to, Director of Revenue-Jefferson City, or made payable to - Division of Cosmetology - Jefferson City, Mo.

"Would like an official opinion, if any of our office employees are entitled to hold two positions in our office to wit - First, as our Secretary and also as Inspector calling on all the Schools in the State of Missouri, with unlimited expense account. Thus making it necessary to hire another girl in the office.

"I wish to know, Can The Board Members, legally raise the office secretary's salary of three hundred and seventy dollars per month, which is the listing in 'The Blue Book.' The Board also wishes to know if They can allow Bonus to Office employees?

"The Board wishes an official opinion, as to whether or not the Secretary of our office can go to such places as Miami, Florida, Chicago, New York, Kentucky and California, etc. with all expenses paid by The State of Mo."

Your first inquiry is whether examination and annual

Miss Edna Marie Pray

registration fees as imposed by Chapter 329, RSMo 1949, should be made payable to the "Division of Cosmetology" or to the "Director of Revenue, Jefferson City."

Chapter 320, RSMo 1949, imposes certain examination and annual registration fees upon persons desiring to engage in the occupation of hairdresser, cosmetologist or manicurist or who conduct a hair-dressing, cosmetologist or manicurist establishment, shop or school. Section 329.060, relating specifically to the examination fees required of an applicant for registration provides as follows:

"1. Every person desiring to practice any of the occupations provided for in this chapter shall file with the state board of cosmetology a written application under oath on a form prescribed and supplied by said board and shall submit proof of the required age, educational qualifications and of good moral character together with a fee of ten dollars payable to the director of revenue.

"2. Upon the filing of such application and the payment of the examination fee of ten dollars, the state board of cosmetology may issue to said applicant a temporary certificate of registration for a definite period of time but not beyond the next regular examination of applicants for the practicing of the occupations in this chapter provided; and said person receiving said temporary certificate shall be entitled to practice the occupations herein designated until the expiration of said temporary certificate, and after the expiration of said temporary certificate, any person continuing to practice the business as herein defined shall be guilty of a misdemeanor and punished as in this chapter provided."

Section 329.240, RSMo 1949, relating to all fees provided for in Chapter 329 provides as follows:

"All fees provided for in this chapter, shall be payable to the director of revenue who shall keep a record of the account showing the total payments received and shall immediately thereafter deposit the same with the state treasurer in a fund to be known as the 'State Board of Cosmetology Fund' which is hereby created and established. All the salaries and expenses for the operation of said board shall be appropriated and paid from said fund." (Emphasis ours.)

Miss Edna Marie Pray

Under the two foregoing quoted statutory provisions, we believe it is quite apparent that all fees collected should be made payable to the Director of Revenue rather than to the Board of Cosmetology.

You next inquire whether a secretary to the Board, which we understand to mean office secretary rather than the Secretary to the Board, may also hold the position and discharge the duties of an inspector, with an unlimited expense account.

We know of no rule of law which would prohibit a public employee as distinguished from an officer from discharging the duties of several positions, nor do we find any statutory prohibition against the same person acting as office secretary for the State Board of Cosmetology and as an inspector for said Board. We direct your attention to Section 329.230, RSMo 1949 relating to the authority of the Board to employ office personnel and inspectors. Said section provides as follows:

"The board shall elect one of its members president, one vice-president and one secretary, and shall have power to employ and remove such office employees and inspectors as may be necessary for the efficient operation of the board, within the limitations of its appropriation, and to formulate rules and regulations governing its actions; provided, however, the board shall create no expense exceeding the sum received from time to time as fees as provided by law."

It is noted that the Board is granted the authority to employ and remove such office employees and inspectors as may be necessary for the efficient operation of the Board, subject to the qualification that such employment be within the appropriations for such purpose. In view of this provision we are of the opinion that it is within the discretion of the Board as to whether a person shall be employed in a dual capacity, such discretion to be governed by the efficiency in operations promoted by the Board's action. The employees appointed as authorized by Section 329.230 would of course be subject to the control and supervision of the Board.

You next inquire whether the Board can increase an employee's salary above that listed in the "Blue Book" and whether the Board can grant bonuses to office employees. Section 11.030, relating to the publishing of salaries of state employees in the official manual (the Blue Book) provides as follows:

Miss Edna Marie Pray

"There shall be published in said manual the name, salary and post office address, and previous occupation, including street and number, of every officer and employee, of this state, and it shall be unlawful for any officer of this state to pay or authorize the payment of a salary to any appointee or employee unless he shall first file with the secretary of state, for publication in the manual, the name, salary, post office address and previous occupation of such employee."

This section was first enacted in Laws 1923, page 294, Section 2, and did not impose the requirement that the information filed with the Secretary of State should include the salary of the officer or employee. The Amendatory Act of 1941 imposed a requirement that the salary of said officer or employee should also be included in the information filed.

It is a cardinal rule of statutory construction that effect should be given to the intention of the Legislature by adopting a construction which will harmonize the context and promote the apparent objects of the Legislature. State v. Ball, 171 S.W. 2d. 787.

Section 11.020, RSMo 1949, provides that the Secretary of State shall biennially as soon as practicable after the organization of each General Assembly prepare and publish a Missouri Manual.

Section 11.030, RSMo 1949, provides that there shall be published in said Manual the name, salary, post office address, including street, number and previous occupation of every officer and employee of the state. In view of the purpose of the filing of the aforementioned information (that is, publication) we do not think that it is unlawful to increase the salary of an employee who has once been listed in the "Blue Book" prior to filing such information with the Secretary of State, provided however, that such information should be filed with the Secretary of State at such time as he may direct prior to the next publication of said Manual.

In regard to the payment of bonuses to employees we direct your attention to Section 39 of Article III of the Constitution of Missouri which provides, in part, as follows:

"The general assembly shall not have power:

* * * * *

Miss Edna Marie Pray

"To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;"

The Constitutional provision prohibits the General Assembly from granting extra compensation, fees or allowances to a public officer, agent or servant after service has been rendered. Likewise, a government agency which derives its power and authority from the Constitution and laws of this state would be prohibited from granting extra compensation in the form of bonuses to public officers or servants after the service has been rendered.

Lastly, you inquire as to whether the office secretary to the State Board of Cosmetology is authorized to travel outside the state, the expenses of such travel to be borne by the state of Missouri. Section 33.090, authorizes and empowers the state Comptroller to promulgate rules and regulations governing the incurring and payment of reasonable and necessary travel and subsistence expenses actually incurred in behalf of the state. Pursuant to such authority the state Comptroller has adopted the following rule currently on file:

"Rule 2. Traveling expenses which will be reimbursed are confined to those expenses essential to the transacting of official business of the State of Missouri."

We also note the following rule stated in 67 C.J.S. Officers, Section 91, page 329:

"* * *However, in order to justify indemnification of a public officer for an expense incurred in the discharge of his official duties, the officer must have acted in good faith, in the discharge of a duty imposed or authorized by law, and in a matter in which the government has an interest."

No applicable rule of law or statutory provision or regulation is found which would limit the incurring of expenses for travel and subsistence to travel within the state and therefore we must conclude that a public official or employee may be reimbursed for expenses reasonably incurred in travel beyond the state in the discharge of official duties and in matters which the government has an interest. What has been said in relation to travel beyond the state would likewise be applicable to an employee traveling

Miss Edna Marie Pray

within the state in the discharge of official duties.

CONCLUSION

Therefore, it is the opinion of the office that:

1. All fees collected by the State Board of Cosmetology should be made payable to the Director of Revenue;
2. There is no prohibition against an employee of the State Board of Cosmetology discharging the duties of an inspector and secretary at one and the same time if, in the Board's discretion, such action is conducive to efficient operation;
3. An officer of this state may authorize an increase in salary to an employee different from that listed in the official manual.
4. The State Board of Cosmetology may not grant bonuses to employees;
5. Employees of the Board may travel beyond the state and receive reimbursement therefor, if such expense is incurred in the discharge of official duties, in a matter in which the government has an interest, and within the appropriation provided for that purpose.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

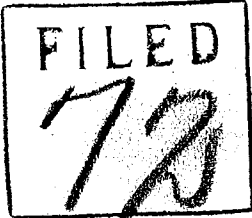
Yours very truly,

John M. Dalton
Attorney General

DDG:mw

SCHOOLS:
SCHOOL DISTRICTS:
TAXATION:
CONSTITUTIONAL LAW:

School district governed by three directors, but containing within its boundaries incorporated village, may levy a tax of one dollar on the \$100 assessed valuation without a vote of the people. Elections conducted under laws applicable to common school districts.



June 17, 1955

Honorable Thomas V. Proctor
Prosecuting Attorney
Monroe County
Paris, Missouri

Dear Mr. Proctor:

This is in response to your request for opinion dated April 23, 1955, which reads as follows:

"There is a school district in this county commonly called the Stoutsville School District. It is a common School District but has within its bounds the Village of Stoutsville which is an incorporated village and has about 175 inhabitants. The School District is composed of the village of Stoutsville and surrounding territory.

"The above mentioned school district has been having trouble in voting a school levy of \$2.65 on the one hundred dollars valuation for school purposes. They have been operating upon the theory that the above mentioned levy had to carry by a two thirds majority.

"I have noted that Article X, Section 11(b) of the constitution of Missouri was amended in 1950, and now provides that in school districts in which are located cities, towns or villages, the school boards may levy a \$1.00 tax on the \$100.00 valuation. The above article of the Constitution further provides that school district taxes may be voted and increased by a majority vote for a one year period if the total levy does not exceed three times the constitutional limit as is provided in paragraph four of the above mentioned article of the constitution. In other words the sum of \$3.00 on the one hundred dollars valuation.

Honorable Thomas V. Proctor

"The above mentioned school district is not organized into a City, Town or Consolidated District as is provided in Section 165.263, R.S. 1949, but is as above stated a common school district.

"Will you please advise me if it is your learned opinion that the above Stoutsville School District can vote a \$2.65 tax levy for school purposes by a majority vote instead of a two thirds vote, and if so may they so do at an election that is held under the regulations of elections for common school districts."

Section 11(b), Article X, Constitution of Missouri, reads, in part, as follows:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * * * *

"For school districts formed of cities and towns - one dollar on the hundred dollars assessed valuation, except that in the city of St. Louis the annual rate shall not exceed eighty-nine cents on the hundred dollars assessed valuation;

"For all other school districts - sixty-five cents on the hundred dollars assessed valuation."

Section 11(c), Article X, Constitution of Missouri, 1945, as amended in 1950, to which you also refer, reads, in part, as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the

Honorable Thomas V. Proctor

qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor;
* * *

The question is whether a school district governed by three directors, and hence under the classification laws a common district, but containing within its boundaries an incorporated village, may levy a tax of \$2.65 for one year upon a majority vote.

It was held in State ex rel. Brown v. Woods, 332 Mo. 1123, 61 S.W. (2d) 732, that similar provisions under the 1875 Constitution were self enforcing. This proposition was reaffirmed in Vanlandingham v. Reorganized School District No. R-IV of Livingston County (Mo.), 243 S.W. (2d) 107, 110. Although the Legislature may enact laws classifying school districts, as was held in both of the above cases, such laws for the purpose of limiting the rate of taxation may not be more restrictive than the constitutional provision with respect thereto.

The Constitution makes no mention of the number of directors which a district must have before it can levy a tax of one dollar on the \$100 assessed valuation without a vote of the people, but merely requires that it be formed of a city or town. Under the definition of "town" as given in the Vanlandingham case, we are of the opinion that Stoutsville is a town within the meaning of Section 11(b), Article X, Constitution of Missouri, and that the Stoutsville School District may levy a tax of one dollar on the \$100 assessed valuation without a vote of the people.

It necessarily follows that under Section 11(c), Article X, Constitution of Missouri, 1945, as amended in 1950, it may also levy a tax of two dollars and sixty-five cents for one year upon a majority vote since that is within the limit specified therein.

Honorable Thomas V. Prector

You have informed us that under the classification law, Section 165.010, RSMo, Cum. Supp. 1953, the Stoutsville District is a common district. Therefore, the election should be held in accordance with the laws applicable to common school districts and those applicable to all districts generally.

CONCLUSION

It is the opinion of this office that a school district governed by three directors, but containing within its boundaries an incorporated village, may levy a tax of one dollar on the \$100 assessed valuation without a vote of the people. It is the further opinion of this office that elections held for the purpose of increasing the rate of taxation in such a district should be conducted in accordance with the laws applicable to common school districts and those applicable to all districts generally.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

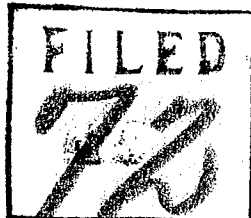
JOHN M. DALTON
Attorney General

JWI:ml:gm

REPRESENTATIVES: The apportionment of representatives is according to the last decennial census of the United States and representatives cannot be apportioned according to any census taken by any county, nor can the representation of a county be increased prior to the next United States census by an act of the Legislature or otherwise.

APPORTIONMENT:

CONSTITUTION:



August 1, 1955

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Pratt:

Your request for an opinion reads as follows:

"I have been recently requested to obtain an opinion from you on the following question:

"Under Article three, Paragraph nine, Constitution, State of Missouri, it is provided that Clay County shall have one representative in the general assembly. This provision was made prior to the time that Clay County became a second class county and the same section provides that the other three second class counties of this state have three representatives. Article three Paragraph two of the Constitution provides for the apportionment of representatives according to the population in a ratio with the whole number of inhabitants of the state divided by two hundred. Due to the great increase in the population of this county within the last five years, the question is how many representatives are we entitled to at this time, and whether the number can be increased prior to the next regular United States census, or if the number of representatives may be increased before such time by an act of the legislature.

"We would further appreciate knowing if there is any possible way the county could take a census of the county, and thereby on a basis of the census be entitled to additional representation."

Honorable Stephen R. Pratt

The apportionment of representatives in the General Assembly of Missouri is controlled by Article III, Sections 2, 9 and 10 of the Constitution of Missouri, 1945. Section 2 reads as follows:

"The house of representatives shall consist of members elected at each general election and apportioned in the following manner. The ratio of representation shall be the whole number of the inhabitants of the state divided by the number two hundred. Each county having one ratio, or less, shall elect one representative; each county having two and a half times the ratio shall elect two representatives; each county having four times the ratio shall elect three representatives; each county having six times the ratio shall elect four representatives, and so on above that number giving an additional member for every two and a half additional ratios. On the taking of each decennial census of the United States, the secretary of state shall forthwith certify to the county courts, and to the body authorized to establish election precincts in the City of St. Louis, the number of representatives to be elected in the respective counties."

Section 9 reads as follows:

"Until apportionment of the representatives can be made in accordance with this article, the house of representatives shall consist of one hundred fifty-four members apportioned among the several counties as follows: The County of Buchanan shall have three; the County of Greene shall have three; the County of Jackson shall have eleven; the County of Jasper shall have three; the City of St. Louis shall have eighteen, the County of St. Louis shall have seven, and each of the other counties shall have one."

Section 10 reads as follows:

"The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial

Honorable Stephen R. Pratt

and representative districts. Such districts may be altered from time to time as public convenience may require."

The Legislature has also provided, in Sections 22.040 and 22.050, for the apportionment of representatives to each county in accordance with the above constitutional provisions. It will be noted that in Article III, Section 2, above, the Secretary of State is to certify to the county courts and to the body authorized to establish election precincts in the city of St. Louis the number of representatives to be elected in the respective counties after the taking of each decennial census of the United States, and in Article III, Section 10, cited above, it is explicitly stated that the last decennial census of the United States shall be used in apportioning representatives. The provisions of Article III, Section 9, were to be used only until the apportionment as provided in Article III, Section 2, was carried out. After the taking of the 1950 census, the Secretary of State did so certify to the county courts and to the Board of Election Commissioners of the City of St. Louis the number of representatives to be elected in the respective counties according to the 1950 census. In accordance with these three sections of Article III, there will be no new apportionment until after the taking of the 1960 United States census. Thus, since these three sections of Article III of the Constitution of Missouri, 1945, provide for the only means of apportionment of representatives in the counties of the state and the city of St. Louis, it is the opinion of this office that Clay County is only entitled to such representation as was apportioned it after the 1950 census and that the number of representatives in Clay County cannot be increased prior to the next United States decennial census by an act of the Legislature or on a basis of a census taken by the county.

CONCLUSION

It is the opinion of this office that the apportionment of representatives to the counties of the state and to the city of St. Louis can be made only in accordance with Article III, Sections 2, 9 and 10, Constitution of Missouri, 1945, and thus only after each decennial United States census, and not otherwise.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harold L. Volkmer.

Yours very truly,

JOHN M. DALTON
Attorney General

HLV:ml

LIBRARIES:

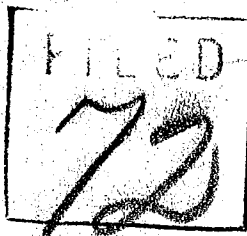
Senate Bill No. 286 requires county courts or city councils to reduce library tax rates but does not

TAXATION:

make mandatory such reductions in rates which would prevent a library from receiving state aid

RATES OF LEVY:

under Section 181.060.



August 9, 1955

Mr. Paxton P. Price
State Librarian
Missouri State Library
State Office Building
Jefferson City, Missouri

Dear Sir:

This is in response to your opinion request dated July 19, 1955, which reads as follows:

"Would you please give this office your opinion on these questions:

"Facts:

"1. S.B. 286, passed by the 68th General Assembly, requires local tax rates be reduced when assessed valuations are increased a certain percentage.

"2. Public Library statutes provide that library tax rates shall be determined by popular petition and vote.

"3. Section 181.060, RSMo 1949, contains this clause: 'provided, that no grant shall be made to any public library if the rate of tax or the appropriation for said library should be decreased below the rate in force at the time of the enactment of this chapter. . . .'

"4. S.B. 286 contains this clause: 'No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds.'

"Questions:

"1. Is there any other local legal body constituted as 'taxing authority' other

Mr. Paxton Price

than the public at large in a political subdivision that can initiate action to reduce library tax rates in compliance with the provisions of S.B. 286?

"2. What methods can the 'taxing authority' use to reduce local library tax rates other than that prescribed in Section 182.010 and Section 182.140, R.S. Mo. 1949, as applied in those cases where the original tax being reduced was fixed under the provisions of those sections?

"3. Would an otherwise eligible library, receiving state aid grants at present under the provisions of Section 182.160, R.S. Mo. 1949, which had its local library tax rate or appropriation reduced under the provisions of S.B. 286, be made ineligible for further grants-in-aid by reason of taking such action?"

The first two questions asked involve the issue: What local legal bodies are authorized to reduce library tax rates under Senate Bill No. 286 and how may they do so when the original tax was set under Sections 182.010 and 182.140, RSMo 1949.

Section 182.010 provides, in part:

"Whenever one hundred taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as 'county library district,' and asking that an annual tax be levied for the purpose herein specified, and shall specify in their petition a rate of taxation not to exceed two mills on the dollar; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital

Mr. Paxton Price

of such petition, including a description of such proposed county library district, and of its finding aforesaid; and shall order that the propositions of such petition be submitted to the voters of such proposed district at the next annual election to be held the first Tuesday in April; * * * and every voter within such proposed county library district may, in his proper district vote

'For establishing _____ county library district,'

or

'Against establishing _____ county library district,'

and may vote

'For _____ mills tax for a free county library,'

or

'Against _____ mills tax for a free county library; * * *'

County library districts, as such, have no power to tax. "Such taxation privileges as have been conferred upon county library districts are exercised solely upon a vote of the affected inhabitants of such district, and upon being authorized to do so by such vote the actual tax levy is made by the county court wherein such library district is located." (Attorney General Opinion 72, 1954.) See Section 182.020, RSMo 1949.

Section 182.140 states:

"When one hundred taxpaying voters of any incorporated city shall petition the mayor

Mr. Paxton Price

and common council asking that an annual tax be levied for the establishment and maintenance of a free public library in such incorporated city, and shall specify in their petition a rate of taxation, not to exceed two mills on the dollar annually, and in cities of over one hundred thousand inhabitants not to exceed two-fifths of one mill annually on all the taxable property in the city, such mayor and common council shall direct the proper officer to give notice in his next legal notice of the annual election, or special election, which may be called for the purpose of voting on such question, that at such election every voter may vote

'For a _____ mill tax for a free public library.'

or

'Against a _____ mill tax for a free public library.'

Specifying in such notice the rate of taxation mentioned, in said petition; * * *

Once authorized, the tax is to be levied and collected in the same way as other general taxes of the city.

Senate Bill No. 286 states;

"Whenever the assessed valuation of real or personal property within the county has been increased by ten per cent or more over the prior year's valuation, either by an order of the state tax commission or by other action, and such increase is made after the rate of levy has been determined and levied by the county court, city council, school board, township board or other bodies legally authorized to make levies, and certified to the county clerk, then such taxing authorities shall immediately revise and lower the rates of levy to the

Mr. Paxton Price

extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. * * *" (Emphasis added.)

Senate Bill No. 286 defines "rate of levy" to include "rates which have been or may be authorized by elections for additional or special purposes." Section 182.010 and Section 182.140, supra, provide, in effect, for elections for special purposes, i.e., elections to establish libraries. The rates of levy are thus to be reduced by the proper taxing authority, which, as has been pointed out, is the county court or city council. Either one of these groups must, in answer to your questions, reduce library tax rates in order to carry out Senate Bill No. 286.

In answer to the third question raised, it should be noted that Senate Bill No. 286 does not automatically provide for the reduction of the rates of levy. An express qualification has been inserted. "No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds." This provision prevents Senate Bill No. 286 from conflicting with Section 181.060, allowing state aid, "provided, that no grant shall be made to any public library if the rate of tax or the appropriation for said library should be decreased below the rate in force at the time of the enactment of this chapter * * *."

Because of the way in which Senate Bill No. 286 expressly refers to the substance of Section 181.060, it was not intended to supplant the earlier law. Senate Bill No. 286 must thus be read in the light of Section 181.060, in which case it becomes clear that libraries need not under Senate Bill No. 286 have their levies reduced below the point specified in Section 181.060.

CONCLUSION

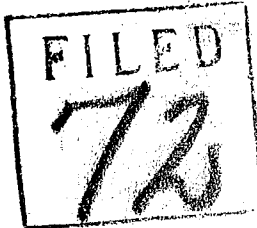
It is the opinion of this office that Senate Bill No. 286, 68th General Assembly, requires county courts or city councils to reduce library tax rates but that Senate Bill No. 286 does not make mandatory such reductions in rates which would prevent a library from receiving state aid under Section 181.060, RSMo 1949.

Yours very truly,

JOHN M. DALTON
Attorney General

WLaB:ml:irk

GRAND JURIES: Grand jury in Clay County selected by sheriff or board of jury commissioners in accordance with judge's direction.



November 17, 1955

Honorable Stephen R. Pratt
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Pratt:

We received your request for an opinion of this office, which reads as follows:

"Would you please give me an opinion as to the proper procedure for the selection of a Grand Jury for Clay County?"

"As you know, Clay County is a second class county, but we have a population of less than sixty thousand according to the last census."

As you mentioned in your opinion request, Clay County is a county of the second class having a population of less than sixty thousand inhabitants according to the last census. We find no statutory provision especially applicable to the selection of a grand jury for a county in such situation. Sections 495.040, et seq., RSMo 1949, were amended by House Bill No. 298 of the 68th General Assembly to provide a method for the selection of petit jurors in all second class counties. It formerly applied only to counties having a population between sixty thousand and two hundred thousand inhabitants. The amendment was necessary in order to make express provision for the selection of petit jurors in Clay County. However, no amendment was made of any statutory provision relative to the selection of grand juries to make any such statutes applicable to a second class county having a population of less than sixty thousand inhabitants.

In the absence of any statute especially applicable to Clay County, the general statutory provisions for the selection of grand jurors should be followed. Such procedure is set out in Section 540.020, RSMo 1949, which reads, in part, as follows:

Honorable Stephen R. Pratt

"1. No grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies, but when so assembled such grand jury shall have the power to investigate and return indictments for all grades of crimes, and hereafter, whenever the judge of any court having power to try and determine felonies shall deem it necessary to cause a grand jury to be convened, he shall make an order, and if in vacation file the same with the clerk of said court and in term time he shall cause the same to be spread upon the records of said court, which order shall specify the time and place said grand jury shall be convened, and shall further specify whether said grand jury shall be drawn and selected by the board of jury commissioners or selected by the sheriff, and if said order shall require that said grand jury be drawn and selected by the board of jury commissioners, the clerk of said board of jury commissioners shall cause said board of jury commissioners to be convened and said board of jury commissioners shall thereupon draw and select said grand jury and the same shall be summoned in the same manner as provided by law for the selection and summoning of petit jurors. And if the said order shall require the sheriff of said county to select said grand jury, the clerk shall issue a special venire and deliver the same to the sheriff and he shall forthwith proceed to select the same, selecting them as nearly equal from each township in said county as possible."

Under the provisions of this section the circuit judge who orders the convening of the grand jury should specify whether the grand jury will be selected by the sheriff or by the board of jury commissioners. If the latter procedure is followed, it would be the procedure set out in Sections 495.040 to 495.190, RSMo 1949, as amended.

CONCLUSION

Therefore, it is the opinion of this office that the procedure for the selection of grand jurors in Clay County is to

Honorable Stephen R. Pratt

be determined by the circuit judge convening such grand jury, in accordance with Section 540.020, RSMo 1949. Under said section the grand jurors will be selected either by the sheriff or the board of jury commissioners in accordance with the judge's direction.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

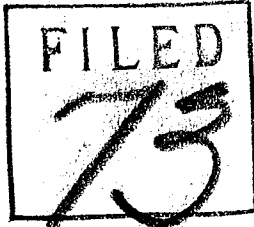
Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

MISSOURI TURNPIKE AUTHORITY:

Senate Bill #206 would not impose any obligation upon the state for Turnpike Authority debts.



February 9, 1955

Honorable William M. Quinn
Missouri State Senate
Jefferson City, Missouri

Dear Senator Quinn:

We have received your request for an opinion of this office which request reads as follows:

"Senate Bill No. 206, introduced in the 68th General Assembly, provides for the establishment of a Missouri Turnpike Authority. By Section 4 of said bill the Authority consists of the members of the Missouri State Highway Commission, together with the Governor and State Geologist as ex officio nonvoting members.

"The bill provides for the issuance by the Authority of revenue bonds for the financing of toll road projects. I would like your opinion as to whether or not under said bill the Missouri Turnpike Authority would have the power to obligate in any manner the State of Missouri or any political subdivision or the Missouri State Highway Commission or Department for payment of the bonds issued by the Missouri Turnpike Authority or of any other obligations which might be incurred by the Missouri Turnpike Authority."

Senate Bill No. 206 of the 68th General Assembly would create a Missouri Turnpike Authority authorized to construct and maintain turnpike projects in the State of Missouri. By Section 4 of the Bill the authority consists of the members of the State Highway Commission together with the Governor and State Geologist as members, ex officio. Bearing on the question presented by you are the following provisions found in the Bill.

Honorable William M. Quinn

Section 8(6) provides as follows:

"To issue turnpike revenue bonds of the authority, payable solely from revenues or other funds pledged for their payment as herein provided, for the purpose of paying all or any part of the cost of any one or more turnpike projects;"

Section 18 provides, in part, as follows:

"The authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of turnpike revenue bonds of the authority for the purpose of paying all or any part of the cost of any one or more turnpike projects. The principal of and the interest on such bonds shall be payable solely from the funds herein provided for such payment.
* * * * *"(Emphasis ours.)

Section 21 provides:

"Turnpike revenue bonds issued under the provisions of this act shall not be deemed to constitute a liability or debt of the state or of any political subdivision thereof or a pledge of the faith and credit of the state or of any such political subdivision but such bonds shall be payable solely from the funds pledged for their payment as authorized herein, unless such bonds are refunded by refunding bonds issued under the provisions of this act, which refunding bonds shall be payable solely from funds pledged for their payment as authorized herein. All such turnpike revenue bonds shall contain on the face thereof a statement to the effect that the bonds, as to both principal and interest, are not an obligation or liability of the state of Missouri, or of any political subdivision thereof, but are payable solely from the revenues and funds pledged for their payment."

Section 22 provides:

"All obligations incurred in carrying out the

Honorable William M. Quinn

provisions of this act shall be payable solely from funds provided under the authority of this act and nothing in this act contained shall be construed to authorize the authority to incur indebtedness or liability on behalf of or payable by the state or any political division thereof."

Section 34 provides, in part:

"The authority is hereby authorized to provide by resolution for the issuance of turnpike revenue refunding bonds of the authority payable solely from revenues for the purpose of refunding any bonds then outstanding which shall have been issued under the provisions of this act, * * *"

The above quoted provisions make it quite clear that the Bill proposes to finance the operation of the Missouri Turnpike Authority by revenue bonds payable solely from the tolls of turnpikes constructed by the Authority. The Bill expressly provides that the state, or none of its political subdivisions shall, in no event, be liable for the principal or interest on said bonds.

The courts of numerous states have recognized the validity of so-called revenue bonds and have particularly pointed out that as a feature of said bonds no liability is imposed upon the state or other political subdivision for the principal or interest on said bonds. The holders thereof are required to look solely to the income of the projects financed for the payment of said bonds.

Thus, in the case of Ziegler v. Witherspoon, 331 Mich. 337, 49 N.W. 2d. 318, 1.c. 325, the court stated:

"Revenue bonds are issued to raise funds to purchase or construct utilities or other public structures, and are payable only from the revenues received from the operation of the utilities or structures. The credit of the state is not pledged for their payment.
* * * * (Emphasis ours.)

In the case of California Toll Bridge Authority vs. Wentworth, 212 Calif. 298, 298 P. 485, 1.c. 486, the court stated:

Honorable William M. Quinn

"* * *The overwhelming weight of judicial opinion in this country is to the effect that bonds, or other forms of obligation issued by states, cities, counties, political subdivisions, or public agencies by legislative sanction and authority, if such particular bonds or obligations are secured by and payable only from the revenues to be realized from a particular utility or property, acquired with the proceeds of the bonds or obligations do not constitute debts of the particular state, political subdivision, or public agency issuing them, within the definition of 'debts' as used in the constitutional provisions of the states having limitations as to the incurring indebtedness. * * *"

In the case of State Bridge Commission vs. H. J. Nease Co. 153 S.E. 305, l.c. 306, the Supreme Court of Appeals of West Virginia in discussing revenue bonds stated, l.c. 487:

"* * *Are these bonds a debt of the state within the meaning of said section 4, above quoted? The act expressly says in section 12 thereof that nothing therein shall be construed or interpreted to authorize the incurring of a state debt of any kind or nature. The payment of the bonds is to be made exclusively from the revenues derived from the bridges. No other revenues are applicable. Taxation for their redemption in any form cannot be imposed. The state cannot be compelled to pay them. The act itself is a part of the bonds as if written therein in extenso. The purchasers of the bonds are bound by the act, and cannot look to the state for payment. * * * * (Emphasis ours.)"

Similar discussions are to be found in the cases of Alabama State Bridge Corporation vs. Smith, 217 Ala. 311, 116 So. 699; Estes vs. State Highway Commission, 235 Ky. 86, 29 S.W. 2d. 583.

Therefore, it is well settled that when an Authority, such as here proposed, issues bonds and such bonds are made payable solely from the revenues derived from the project thereby financed, such bonds do not constitute, and cannot become, an obligation of the state which created the Authority, or of any of its political subdivisions.

Honorable William M. Quinn

As for the imposition of liability upon the State Highway Commission or State Highway Department, there is absolutely nothing in the Bill which could result in the State Highway Commission becoming liable on said bonds and causing the payment thereof to be made from the state road funds. Actually, the Bill quite clearly provides that any damage to the state highway system shall be reimbursed by the Authority solely out of the proceeds of the bonds issued by it. Such provisions are found in Sections 10 and 11.

Section 35 of the Bill does authorize the State Highway Commission eventually to take over any turnpike constructed by the Authority but, it may do so only after the project has been paid for or a sufficient amount of money has been received from the tolls and set aside for the benefit of bondholders to pay any balance remaining unpaid. It may also be noted that under this section such turnpikes may be taken over by the Highway Commission "if then in good condition and repair to the satisfaction of the State Highway Commission."

Section 36 of the Bill does authorize the State Highway Commission, prior to the receipt of funds from the sale of bonds by the Authority, to agree with the Authority for the employment of Highway Commission personnel in the original stages of the project, however, this section expressly provides for the reimbursement by the Authority of the Commission for any funds expended by the Commission in connection with the projects.

CONCLUSION

Therefore, it is the opinion of this office that as Senate Bill No. 206 now stands the issuance of bonds for the financing of turnpike projects by the Missouri Turnpike Authority and the operation of turnpikes by said Authority would not in any manner obligate the State of Missouri, or any political subdivisions thereof, or the Missouri State Highway Commission, or Department, for the payment of the bonds issued by the Missouri Turnpike Authority, or any other obligations which might be incurred by said Authority.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Robert R. Welborn.

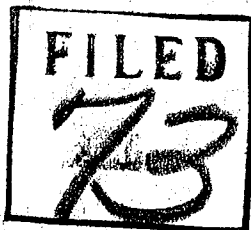
Yours very truly,

JOHN M. DALTON
Attorney General

RRW:mw

DIVISION OF MENTAL DISEASES:
ELEEMOSYNARY INSTITUTIONS:

Applicable rules for determination of
eligibility for employment by Division
of Mental Diseases of members of American
Friends Institutional Service Unit.



March 10, 1955

Honorable B. E. Ragland
Director, Division of Mental Diseases
Department of Public Health and Welfare
State Office Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department reading as follows:

"The American Friends Service Committee
has offered to place an Institutional
Service Unit in one or more of the state
mental hospitals. These Service Units
are composed of students who have been
screened by the committee and found to
be suited for this type of work. The
unit will be employed at the hospital
for a period of ten weeks during the
summer months and will be considered
as employees of the hospital, receiving
pay comparable to Hospital Attendants.

"Section 191.070, RSMo., 1949, provides
in part as follows: 'Such employees
shall be persons of good character and
integrity and residents of this state
for one year, except that residence in
this state shall not be necessary in
cases of appointment of physicians,
nurses, technicians, dietitians, and
other professionally trained person-
nel.'

"Since some of the members of the unit
will not be citizens of the State of
Missouri and in view of the above-men-
tioned section, I respectfully request

Honorable B. E. Ragland

your official opinion as to whether or not the members of the unit must be limited to citizens of the State of Missouri.

"For your information, I am herewith enclosing brochure published by the American Friends Service Committee."

At the outset, we wish to direct your attention to a portion of Section 19, Article IV, Constitution of Missouri, reading as follows:

"* * * All employees in the state eleemosynary and penal institutions, and other state employees as provided by law, shall be selected on the basis of merit, ascertained as nearly as practicable by competitive examinations; * * * * *

Pursuant to the constitutional directive contained in the quoted provision, the General Assembly has enacted what now appears as Section 191.070, VAMS, relating to the employment of personnel by the Department of Public Health and Welfare. Paragraph 1. of the section mentioned reads as follows:

"1. All employees of the department of public health and welfare, except the department director, the division directors, and one secretary for each director, chaplains, patients or inmates of state charitable institutions who may also be employees in such institutions, and persons employed in an internship capacity as a part of their formal training leading to an academic degree, shall be selected in accordance with the state merit system law, notwithstanding that such office, position, or employment may be specifically exempted under the state merit system law. Such employees shall be persons of good character and integrity and residents of this state for one year, except that residence in this state shall not be necessary in cases of appointment

Honorable B. E. Ragland

of physicians, nurses, technicians, dietitians, and other professionally trained personnel."

It is noted that persons employed in an internship capacity, as a part of their formal training leading to an academic degree, have been specifically exempt from the provisions of the statute. However, you have, subsequent to your official request, advised the writer that the proposed employees do not fall within such exempt category. We, therefore, deem it necessary to point out that the employment of such persons, if found otherwise eligible in accordance with what is said hereinafter, must be subject to the applicable provisions of the state merit system.

Your specific question is directed to the possible exemption from the residential requirements contained in the statute of the employees mentioned by virtue of the exemption therefrom of "physicians, nurses, technicians, dietitians and other professionally trained personnel."

It is a general rule of statutory construction that the inclusion of items specifically enumerated followed by a more general and apparently all-inclusive phrase requires that a construction be adopted that excludes from the all-inclusive phrase items except those of the same nature as specifically enumerated. Applying this rule, it appears that the General Assembly has intended to exempt from the residential requirements only appointees of the same general character as those enumerated, i. e., physicians, nurses, technicians and dietitians. We have no information as to the exact nature of the professional training previously received by the persons making up the Institutional Service Unit referred to in your letter of inquiry. If their past training has been such as to permit their inclusion within the phrase "other professionally trained personnel," it appears that they are exempt from the statutory residential requirements. A contrary conclusion, of course, must be reached if the status of such persons is not such as to bring them within the meaning of the phrase quoted. This being a question of fact, the determination of the exact status of any one prospective employee must be left to the discretion vested in the appointing power to be exercised upon the basis of applicable facts.

CONCLUSION

In the premises, we are of the opinion that:

1. Prospective employees of the Division of Public Health

Honorable B. E. Ragland

and Welfare, to be supplied through an American Friends Institutional Service Unit in the capacity outlined in your letter of inquiry and subsequent telephonic conversation, must comply with the requirements of the state merit system; and,

2. Such prospective employees are exempt from the statutory residential requirement of one year contained in Section 191.070, VAMS, only if their status is such as to be comprehended within the phrase, "other professionally trained personnel" as used in such section.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB:DA

MAGISTRATE & CIRCUIT COURTS:
THIRD AND FOURTH CLASS COUNTIES:
DELINQUENT AND NEGLECTED CHILDREN:
DIVISION OF WELFARE:

Prosecuting attorneys in third and fourth class counties are authorized to file a complaint of neglected^{or} delinquent children in either circuit or magistrate

court. Likewise, the sheriff is authorized to file such a complaint in a magistrate court. Sheriffs of such counties having a county superintendent of public welfare or a probation officer, automatically become assistant probation officers without necessity of appointment.



May 3, 1955

Honorable C. Frank Reeves
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

This will acknowledge your request for an official opinion inquiring:

"1. I would like to have your opinion on the following:

"Does the Prosecuting Attorney have the authority to investigate proceedings in Juvenile Court based on his own information or complaint without an affidavit by some person of the County?

"2. If not, is there any other way to institute proceedings to declare a child either a neglected child or a Juvenile Delinquent without a petition by the Welfare Department or an affidavit of a citizen of the County, except by transfer of Juvenile Court when an information has been properly filed in the Magistrate or Circuit Court charging a person under seventeen years of age with the commission of a crime, a misdemeanor or a felony?

"3. Can the Sheriff, as Probation Officer, make a complaint that will confer jurisdiction on the Magistrate?

"4. Does Section 211.255, Laws 1953, constitute the Sheriff Probation Officer without any express appointment in Counties of third class where there is no such officer as mentioned in said section?"

Honorable C. Frank Reeves

Section 211.310 to 211.510, RSMo 1949, applies to children under seventeen years of age in third and fourth class counties (see Section 211.310, supra).

Under Section 211.360, RSMo 1949, any reputable person may file a complaint that any child in the county appears to be neglected or delinquent, whereupon the county prosecuting attorney shall file a petition with the clerk of the juvenile court stating the facts and verified by his affidavit, which affidavit may be on information and belief. Said section reads:

"When any reputable person, being a resident of the county, shall file a complaint with the prosecuting attorney, stating that any child in the county appears to be a neglected or delinquent child, the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition in writing, setting forth the facts and verified by his affidavit. It shall be sufficient that the affidavit be on his information and belief. It shall be the duty of the prosecuting attorney immediately thereafter to fully investigate all the facts concerning such neglected or delinquent child including its school attendance, home condition, and general environment, and to report the same in writing to the juvenile court, and upon hearing of such complaint to appear before the juvenile court and present evidence in connection therewith. The prosecuting attorney shall receive as compensation for the additional services and duties required under this law, in addition to the salary and fees now allowed prosecuting attorneys by law, an amount equal to twenty-five per cent of the annual salary of such prosecuting attorney, per annum, to be paid in equal monthly installments upon the warrant of the county court issued in favor of the prosecuting attorney on the county treasurer for that purpose; provided, however, that this section shall be applicable only to counties of the third and fourth classes."

Honorable C. Frank Reeves

We are unable to find any specific statute authorizing prosecuting attorneys to file such complaint; however, we are inclined to believe that the county prosecuting attorney may file such a complaint by virtue of the provisions of Section 211.360, supra, as a reputable person. Webster's New International Dictionary defines "reputable" as follows:

"1. Enjoying good repute; of excellent reputation; held in esteem; honorable; estimable; as, a reputable citizen, firm, or calling; reputable conduct."

Merely because the prosecuting attorney is a public officer of said county does not disqualify him from coming within the classification of a reputable person. Furthermore, we do know that it is the general and accepted practice in most of such counties, and has been for a long time, for the prosecuting attorney to file such complaints. If this were not true, the administration of laws pertaining to delinquent and neglected children would be difficult to administer. While many persons may have knowledge that such complaints should necessarily be filed, many hesitate to file same against minors.

Therefore, we are of the opinion that the county prosecuting attorney may file such complaints, as well as any other reputable person, a resident of said county.

In view of our conclusion as to your first inquiry, we deem it unnecessary to answer your second request.

You further inquire can the sheriff, as probation officer, make a complaint that will confer jurisdiction on the magistrate? He can in like manner, as the prosecuting attorney, qualify as a reputable person under the provisions of Section 211.360, supra. He may file such a complaint under the same authority cited herein for the prosecuting attorney doing the same.

Furthermore, we might add here that said complaint does not have to be filed only in the circuit court, but may also be filed in the magistrate court, which court, in counties of less than 70,000 inhabitants, has concurrent juvenile jurisdiction with the circuit court. While the statutes do not so declare the law, the Constitution of Missouri, under Section 20, Article V, providing for such concurrent jurisdiction, is self-enforcing, and therefore the legislature cannot abrogate the provisions of such Constitution by enacting conflicting laws therewith or for failure

Honorable C. Frank Reeves

to amend the statutes to conform or implement said constitutional provision. (See copies of enclosed opinions so holding.)

Our answer to your fourth and last query is in the negative. Section 211.455, RSMo Cum. Supp. 1953, provides that in third and fourth class counties having a county superintendent of public welfare, or probation officer, the sheriff shall be designated as assistant probation officer; however, said statutes provide in such counties having neither a county superintendent of public welfare or probation officer, that he shall investigate all cases arising under Sections 211.310 to 211.510, and shall furnish the court information and assistance as the judge may require without any mention whatsoever of his being designated or appointed as a deputy or probation officer. So we must hold that Section 211.455, supra, does not have the effect of making the county sheriff also an assistant probation officer in cases where said counties have neither a superintendent of public welfare or a probation officer. In such counties having a county superintendent of public welfare or a probation officer, we believe that it was the legislative intent that the sheriff of such county automatically becomes the assistant probation officer of such counties.

CONCLUSION

It is the opinion of this department that the prosecuting attorney of counties of the third and fourth class do have authority to file such complaints in the circuit and magistrate court without the necessity of filing an affidavit by some other person in the county; likewise, that the sheriff in such counties may make a complaint to a magistrate court who has concurrent juvenile jurisdiction with the circuit court. Furthermore, under the provisions of Section 211.455, supra, the sheriff, in counties of the third and fourth class having a county superintendent of welfare or a probation officer, does not have to be appointed, but automatically becomes an assistant probation officer of such county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

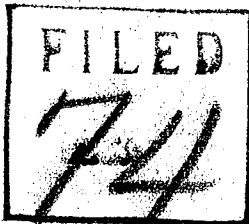
John M. Dalton
Attorney General

ARH/vtl

Enclosures - 3

9-22-47 to B.C. Tomlinson
9-2-52 to Roderick R. Ashby
2-1-54 to Ralph B. Nevins

SCHOOLS:
SCHOOL DISTRICTS:
ELECTIONS:
STATE AUDITOR:
POLITICAL
SUBDIVISIONS:



Election officials in school bond elections may be prosecuted for fraud; ballots cast in school bond elections may be recounted only in case of grand jury investigation and in trial of civil or criminal cases in which violation of election laws is under investigation or at issue; oath of officials in school bond election held on day other than day of annual meeting administered by any official authorized to administer oaths; financial statement required to be published annually in certain school districts; school district political subdivision so as to require State Auditor to make audit upon request of five per cent of voters.

May 31, 1955

Honorable C. Frank Reeves
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Reeves:

This is in response to your request for opinion dated March 10, 1955, which reads, in part, as follows:

"There has been considerable disagreement over the School Bond Issue election held at Anniston, Missouri, July 5, 1954.

"I have studied the Statutes that give authority of voters of School Bond Issue and find no reference to the general election laws nor any criminal provisions for irregularity of voting:

"Would you please send me the answers to the following questions, some of which may have already been decided:

"1. Can the election officials be prosecuted for fraud in a School Bond election?

"2. Can a recount of the ballots be permitted and published?

"3. Who is supposed to administer the oath to the election officials in said elections?

"4. Is a financial statement of the school district required to be published and posted for the information of the people of that district?

Honorable G. Frank Reeves

"5. Upon demand, is it necessary to make an audit of the books of the school district and who can make such an audit?"

With regard to your first question as to whether election officials can be prosecuted for fraud in a school bond election, we direct your attention first to Sections 129.490 and 129.500, RSMo 1949, which read as follows:

Sec. 129.490. "If any judge or clerk of any election authorized by law, or any other person, shall willfully and knowingly receive and place in the ballot box, or aid, assist or assent to the placing in any ballot box, any ballot, or paper purporting to be a ballot, which is not legally voted by a qualified voter at such election, or shall illegally, willfully and fraudulently abstract, or aid in or assent to the abstraction, from any ballot box any legal ballot for the purpose of changing the lawful result of any election, or shall in any manner willfully influence or attempt to influence any person to do any of the acts aforesaid, or to omit to do any lawful act required of him in relation to any election, or shall in any manner illegally, willfully and fraudulently change or attempt to change, or induce any other person to change, the true and lawful result of any election, by any act to be done either before, at the time of or after such election, by a wrong count of the ballots, by changing the true returns or making a false return thereof, or by changing the figures of the returns after they are made up, either before or after the returns are duly made, or in any other manner except in pursuance of law or the order of a court, every person offending against any of the provisions of this section shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not less than three months, and by a fine not less than one hundred dollars, or by both such fine and imprisonment, and shall also be forever prohibited from voting at any

Honorable C. Frank Reeves

election and from holding any office or position of trust or emolument under authority of this state, or any department thereof, or of any county, city or town therein, either by election or appointment, or as clerk or employee."

Sec. 129.500. "Any person who may be authorized by law to receive, canvass or count the poll books, tally lists or election returns of any election authorized by law, who shall willfully and knowingly receive, canvass and count, or assist therein, any poll books, tally lists or election returns which are fraudulent, forged, counterfeited, or shall falsely and fraudulently make an incorrect and false account of any election returns, with intent to defeat a fair expression of the popular will, and any person or persons whose duty it may be to grant certificates of election, or in any manner declare the result of any election held by authority of law, who shall grant a false certificate, or declare the result of any election based upon fraudulent, fictitious or illegal votes or returns, with intent to defeat a fair expression of the popular will, or to deprive any person duly elected of his office, shall be deemed guilty of a felony, and upon conviction, be punished as prescribed in section 129.490."

You will notice that both of the above sections apply to "any election authorized by law." School bond elections are authorized by Section 165.040, MoRS, Cum. Supp. 1953, and hence it is our opinion that the above-quoted sections are applicable to school bond elections and that officials of such elections may be prosecuted for fraud.

This position is strengthened by the fact that Section 129.900, RSMo 1949, expressly provides that Sections 129.820 to 129.890, RSMo 1949, shall not apply to school elections, the inference being that the remaining sections in that chapter were meant to apply to school elections.

With regard to your second question, we are enclosing a copy of an opinion of this office rendered to Mr. Ted A. Bollinger, Prosecuting Attorney of Shelby County, under date of April 13, 1951.

Honorable C. Frank Reeves

Section 3, Article VIII, Constitution of Missouri, 1945, is the section which safeguards the secrecy of the ballot. It reads as follows:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter. All election officers shall be sworn or affirmed not to disclose how any voter voted: Provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence."

The Supreme Court considered the applicability of this section to bond elections in *State ex rel. Miller v. O'Malley*, 342 Mo. 641, 117 S.W. (2d) 319, 322, where it was said:

" * * * There can be no doubt about the fact that the section guarantees the secrecy of the ballot in bond elections, except as relaxed in the proviso.

"The relator contends the proviso appended to section 3, art. 8 in 1924 permits the opening of the ballots in grand jury investigations of fraud in bond elections. In this we think he is right. Before 1924 the proviso allowed it only in all cases of contested elections (and, of course, primary elections, which were not contemplated or protected by the Constitution). The amended proviso permits it: (1) In all cases of contested elections; (2) grand jury investigations; (3) and in the trial of all civil or criminal cases in

Honorable C. Frank Reeves

which the violation of any law relating to elections, including nominating elections, is under investigation or at issue.

"The old proviso was held in many decisions to sanction the opening of the ballots only in statutory contests over the election of public officers. State ex rel. Ewing v. Francis, 88 Mo. 557, 561; State ex rel. Hollman v. McElhinney, 315 Mo. 731, 735, 286 S.W. 951, 952. But this McElhinney Case ruled the amended proviso protects primary elections also, covers contests thereover, and permits the opening of the ballots therein. See, also, State ex rel. McDonald v. Lollis, 326 Mo. 644, 648, 33 S.W. 2d 98, 99. The opening of the ballots in contests over bond elections is held to be unauthorized because the Legislature has not provided for such contests - not because they are not 'elections' or 'contests' within the meaning of the Constitution. State ex rel. Wahl v. Speer, 284 Mo. 45, 223 S.W. 655; State ex rel. Jackson County v. Waltner, 340 Mo. 137, 142, 100 S.W. 2d 272, 274."

Lest there be any misunderstanding, it might be well to point out that there is no provision for a contest of bond elections. Although Section 26(g) of Article VI, Constitution of Missouri, 1945, authorizes contests of bond elections "as provided by law," the Legislature has not implemented this constitutional provision so as to put it into effect. Such a constitutional provision is not self-enforcing. As was said in State ex rel. Miller v. O'Malley, supra, S.W. 1.c. 323:

" * * * A constitutional provision may be self-enforcing in part and not so as to another part. State ex inf. Barker v. Duncan, 265 Mo. 26, 41-43, 175 S.W. 940, 944, Ann. Cas. 1916D, 1. Undoubtedly, the part of the section permitting the opening of ballots in election contests is not self-enforcing, in the sense that further provision must be made by statute for such contests. But the part which provides for the use of the ballots as evidence in grand jury investigations is self-enforcing and no legislative default can thwart it."

Honorable C. Frank Reeves

Therefore, in bond elections the only instances in which the ballots may be opened and recounted are: (1) Grand jury investigations; (2) in the trial of all civil or criminal cases in which the violation of any law relating to elections is under investigation or at issue.

There apparently is no statutory direction as to who is supposed to administer the oath to the election officials in a school bond election such as this, nor are we able to find any case in Missouri on the subject.

There are cases in other jurisdictions, however, which hold that the failure of the election officials to be sworn by the proper official, or to be sworn at all, will not invalidate the election. For instance, in *Bradford v. Grant Parish School Board*, 154 La. 242, 97 So. 430, it was held that a school bond election was not invalidated because the election officials were sworn by a deputy sheriff rather than by a clerk. The court said, *l.c.* 431:

"The failure of the commissioners to take an oath before the proper officer, or to take one at all, will not vitiate an election; it is a mere irregularity."

See also *Hagen v. Consol. School Dist. No. 111-74*, 156 Minn. 268, 194 N.W. 756.

Therefore, in the absence of any express statutory provision on the subject, it is our opinion that the officials in a school bond election held on a day other than the day of the annual school meeting may be sworn before any officer authorized to administer oaths.

Your fourth question is answered by Section 165.360, RSMo 1949, in the law applicable to six-director districts, which reads, in part, as follows:

" * * * it shall be the duty of each of said boards, and of the boards of directors in other school districts in this state having six directors or having high schools, to make and publish annually, on or before the fifteenth of July in each year, in some newspaper published in such school district, and if there be no newspaper published therein, then by written statements posted in five public places in such district, a detailed statement of all receipts of school moneys, when and from what source

Honorable C. Frank Reeves

derived, and all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all purposes for the year; which said statement, so required to be made and published, shall be duly attested by the president and secretary of the board, and the secretary shall forward a copy of said report to the state board of education on forms prescribed by said board.

"2. The state board of education shall not release the state aid apportioned to such a district for the next ensuing school year until a copy of the required report has been received at its office in Jefferson City and has been approved by it, and any board of education or board of directors who shall fail, refuse or neglect to order such statement to be made, and any officer of said board who shall fail, refuse or neglect to prepare such statement and publish and forward the same, as required by the foregoing provisions of this section, when ordered by such board, shall be guilty of a misdemeanor and punished by a fine not to exceed one hundred dollars."

We believe this section to be self-explanatory, and we are enclosing copies of two previous opinions of this office for the proposition that such financial statements are required (Opinion of Attorney General to George W. Kriegesman, Nov. 3, 1933; Opinion of Attorney General to J. H. Wilson, June 6, 1934).

You will please note the changes made in Section 165.360, supra, since the 1929 revision, on which the enclosed opinions are based. We shall not discuss those changes here, however, because they are not pertinent to the question submitted.

Your last question concerns the auditing of a school district. In that connection we refer you to Section 29.230, RSMo 1949, which reads as follows:

"At least once during the term for which any county officer is chosen, the state auditor shall examine, inspect, and audit the accounts of the various county officers of the state supported in whole or in part by public moneys, and without cost to the

Honorable G. Frank Reeves

county, county clerks, circuit clerks, recorders, county treasurers, county collectors, sheriffs, public administrators, probate judges, county surveyors, county highway engineers, county assessors, prosecuting attorneys, county superintendents of schools, in every county in the state which does not elect and have a county auditor. Such audit shall be made by the state auditor as near the expiration of the term of office as the auditing force of the state auditor will permit. Such audit shall be made in counties having a county auditor whenever qualified voters of the county to a number equal to five per cent of the total number of votes cast in said county for the office of governor at the last election held for governor preceding the filing of such petition shall petition the state auditor for such audit, but such counties shall pay the actual cost thereof into the state treasury; provided, that any county having an audit by petition shall not be audited more than once in any one year. He shall audit any department, board, bureau or commission of the state which is under the control or supervision of the governor or any other elected official of the state, upon the request of the governor, and he shall further audit any political subdivision of the state whenever requested to do so by five per cent of the qualified voters of such political subdivision, determined on the basis of the votes cast for the office of governor in the last election held. Such political subdivision shall pay the actual cost thereof; provided, that no political subdivision shall be so audited by petitions more than once in any one calendar or fiscal year."

Under this section it is the duty of the State Auditor to audit the financial accounts of a political subdivision of a state when requested to do so by five per cent of the qualified voters of the political subdivision as determined by the votes cast for Governor at the last election. We are enclosing copy of an opinion of this office rendered to Haskell Holman under date of March 7, 1955, wherein it was held that a city, town or village is a political subdivision within the meaning of Section 29.230, supra. By a parity of reasoning, we are of the opinion that a school district also is a political subdivision within the meaning of this section.

Honorable G. Frank Reeves

CONCLUSION

It is the opinion of this office:

1. That election officials in school bond elections may be prosecuted for fraud;

2. That the ballots cast in a school bond election may be recounted only in the case of (1) grand jury investigations and (2) in the trial of civil and criminal cases in which the violation of any law relating to elections is under investigation or at issue;

3. That the oath of election officials in a school bond election held on a day other than the day of the annual school meeting may be administered by any official authorized to administer oaths;

4. That it is the duty of boards of education in districts having six directors or having high schools to publish annually a financial statement of the district in accordance with Section 165.360, RSMo 1949;

5. That upon the request of five per cent of the qualified voters of the school district as determined by the votes cast for Governor at the last election, it is the duty of the State Auditor to make an audit of the financial accounts of the district in accordance with Section 29.230, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

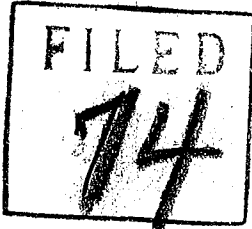
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml
Encs (4)

SHERIFFS:
SHERIFFS' FEES:
FEES:
COSTS:
CRIMINAL COSTS:

Sheriff is not entitled to fees
from the county for services
in criminal matters.



October 19, 1955

Honorable G. Frank Reeves
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

You recently requested an opinion from this office concern-
ing several questions propounded by the clerk of the circuit
court. In the interest of brevity, we are restating the questions
asked, which are:

1. May the sheriff recover from the
county his statutory fees and mileage
for summoning a grand jury?
2. May the sheriff recover from the
county his fees for summoning witnes-
ses before the grand jury?
3. May the sheriff recover from the
county the statutory fee of \$3.00 per
day for attendance on court when such
attendance consists of custody of the
grand jury?
4. May the sheriff recover from the
county fees in a case commenced as a
criminal case and thereafter trans-
ferred to the juvenile court because
of the age of the defendant?
5. May the sheriff recover from the
county his statutory fee of \$3.00 a
day for attendance on the circuit court
when the court, during said day, handles
both civil and criminal matters?

The problems indicated by the above questions arise from the
change made in the scheme of compensation in criminal matters by

*Questions \$3 + 4 have
been withdrawn 11/3/60 J.M.R.
See op# 141 written to
W.R. Byers 1/7/60
#1111
12-1960*

Honorable C. Frank Reeves

the new Missouri Constitution of 1945. That constitution contains a new section, Article VI, Section 13, which reads as follows:

"Compensation of officers in criminal matters - fees. - All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

Prior to the time of the enactment of this section, sheriffs were compensated primarily by fees paid for services rendered by them, and these fees were payable either by the county or by the litigants upon whom costs were assessed. As will be seen, the above new provision in the 1945 Constitution effected a drastic change in this method of compensation of the sheriff for his services in criminal matters. Under this section the sheriff is limited to a salary payable by the state or county, and may not receive additional compensation by way of fees. Any fees which he collects he must, in turn, pay over to the proper treasury.

Pursuant to this constitutional provision the legislature, by Section 57.410 RSMo 1949, as amended Laws 1945 and 1949, provided for the transmission of any criminal fees collected by the sheriff to the county treasurer and, naturally, provided that the sheriff should not collect fees from the county when he would only turn around and pay such fees back to the county. This section provides:

"In all counties of the third and fourth classes, the sheriff shall charge and collect for and on behalf of the county every fee accruing to his office which arises out of his duties in connection with the investigation, arrest, prosecution, care, commitment and transportation of persons accused of or convicted of a criminal offense, except such

Honorable C. Frank Reeves

criminal fees as are chargeable to the county. The sheriff may retain all fees collected by him in civil matters."

(Emphasis ours.)

The statutes providing for fees for sheriffs were originally enacted long before the above discussed new provision of the 1945 Constitution and, consequently, there are some apparent inconsistencies therein. We do not deem it necessary to determine whether these inconsistencies are real or merely apparent. However, as to your first question, Section 57.290, RSMo Cumulative Supplement 1953, provides that the sheriff shall receive a fee of \$4.20 for summoning a grand jury; even though this statute was reenacted in 1953, this provision is identically the same as was found in prior statutes and since Section 57.410 RSMo 1949, as above set out, prohibits the sheriff from collecting fees from the county the sheriff cannot now collect such fee from the county for summoning the grand jury.

As to mileage for summoning such grand jurors, Section 57.300 authorizes the sheriff to collect ten cents per mile when serving such venire summons but the case of Seeleck v. Gordon, 162 SW 629, 254 Mo. 471, holds that such mileage constitutes a part of the compensation of the sheriff, and, under the above-mentioned constitutional and statutory provisions the sheriff cannot collect such additional compensation in criminal matters from the county. However, Section 57.430 RSMo 1953 Cumulative Supplement, authorizes the county to allow the sheriff and his deputies "actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed seven cents per mile." Under this section the sheriff can collect from the county his actual and necessary expenses for each mile traveled in summoning the grand jurors, not to exceed seven cents per mile but, as pointed out above, he cannot collect from the county the fee of ten cents per mile authorized by Section 57.300, supra.

Your second question has to do with fees to the sheriff for summoning witnesses before the grand jury. Because of the constitutional and statutory inhibition upon the sheriff collecting fees in criminal matters from the county, the sheriff cannot collect such fees if they are payable by the county. However, they may properly be included in the costs bill so that if it develops that costs are payable by others than the county or the state such fees may be collected. This conclusion is buttressed by the provisions of Section 550.280 RSMo 1949, wherein it is specifically provided that fees due witnesses before the grand jury are deemed to be criminal costs, and

Honorable C. Frank Reeves

we likewise conclude that the fees due the sheriff for summoning such witnesses would constitute criminal costs.

As to the third question, it would appear that where the sheriff or his deputy is in charge of the grand jury and thereby might be considered as in attendance on the circuit court, so far as to entitle him to his statutory \$3.00 fee therefor, we believe that this would constitute a criminal matter and that the sheriff cannot charge and collect from the county for such fees.

As to question number four, you submit a hypothetical case where a defendant is charged with a crime and that the proceedings in such case are transferred to the juvenile court because of the age of the defendant. It would appear that any fees accruing to the sheriff before such matter was transferred to the juvenile court would constitute fees in a criminal matter, which could not be collected by the sheriff from the county. It appears that after the matter is transferred to the juvenile court that the proceedings are then considered as civil rather than criminal under the holding of the Supreme Court in the case of State v. Heath, 181 SW2d 517, 352 Mo. 1147. Fees accruing in the juvenile court would constitute civil rather than criminal fees and, therefore, the sheriff may collect therefor from the county since the above constitutional and statutory provisions allow the sheriff to collect and retain civil fees. In this connection it should be noted that the juvenile law pertaining to third and fourth class counties provides in Section 211.380: "The cost of the proceedings may in the discretion of the court be adjudged against the petitioner, or any person or persons summoned or appearing, as the case may be, and collected, as provided by law. All costs not so collected shall be paid by the county." Thus, if under this provision the costs are assessed against and collected from one other than the county your problem would not arise, but if they are collected from the county then it is the opinion of this office that no fees accruing to the sheriff before the cause is transferred to the juvenile court may be by him collected from the county.

As to your question number five, it would appear that where the sheriff is in attendance upon the circuit court, and that court handles both civil and criminal matters, that the fee accruing to the sheriff for such attendance could not be said to be absolutely a criminal fee, and since there appears no authority for the pro-rata of such fees it would be the conclusion of this office that such fees should be considered civil, since if the sheriff attended upon the court for one day and, during that day, the court only handled the civil matters which we are assuming, the sheriff would be entitled to his \$3.00 fee from the county. It is not believed that

Honorable C. Frank Reeves

the fact that if, in addition to the civil business which the court handles and which would entitle the sheriff to a fee, the court also handled some matter of criminal business that such circumstances would or should deprive the sheriff of the fees to which he became entitled by reason of attending upon the court when it handled civil business.

CONCLUSION.

It is, therefore, the conclusion of this office that the sheriff may not, under the provisions of Article VI, Section 13, of the Missouri Constitution, and Section 57.410 RSMo 1949, collect fees for the performance of his duties in connection with criminal business from the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

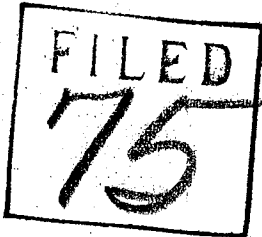
Yours very truly,

John M. Dalton
Attorney General

FLH:lc;am

SCHOOLS:
SCHOOL DISTRICTS:
TAXATION:

Where territory of school district in one county extends into another county and assessed valuation of latter county is increased by more than ten per cent after rate of levy has been determined, school board must redetermine rate of levy in accordance with Senate Bill No. 286, 68th General Assembly.



August 29, 1955

Honorable John M. Rice
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Rice:

This is in response to your request for opinion dated July 29, 1955, which reads as follows:

"I would like your official opinion upon the following question. A recent bill passed by the 68th General Assembly, which amends Chapter 138 R.S. Mo. 1949 by adding section 138.405, provides that when the assessed valuation of real or personal property within the county has been increased by 10% or more over the prior year's valuation, the body authorized to make levies shall revise and lower the levy to the extent necessary to produce substantially the same amount of taxes as previously estimated to be produced by the original levy.

"The following situation exists here, School District No. 6 of Lawrence County, Missouri, the school being located at Pierce City, Missouri, in Lawrence County, extends into Newton County for a considerable distance. Newton County is included in the order of the State Tax Commission for an automatic increase in valuation amounting to more than 10%, but Lawrence County is not included within that order of the State Tax Commission. Does the act provide relief for these tax payers in

Honorable John M. Rice

Newton County, Missouri, as far as this School levy is concerned, and is the school board of School District No. 6 required to revise and lower their rates to take care of the Newton County tax payers?"

The difficulty in construing Senate Bill No. 286, 68th General Assembly, in connection with the situation which you have presented is that in providing that when there is an increase in valuation "within the county," etc., the rate of levy should be reduced, the Legislature failed to recognize that many school districts extend into more than one county. However, we must be guided by what the apparent intent of the Legislature was in enacting this bill.

The bill, including the emergency clause, reads as follows:

"Section 1. Whenever the assessed valuation of real or personal property within the county has been increased by ten per cent or more over the prior year's valuation, either by an order of the state tax commission or by other action, and such increase is made after the rate of levy has been determined and levied by the county court, city council, school board, township board or other bodies legally authorized to make levies, and certified to the county clerk, then such taxing authorities shall immediately revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. Where the taxing authority is a school district it shall only be required hereby to revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation. The lower rate of

Honorable John M. Rice

levy shall then be recertified to the county clerk and extended upon the tax books for the current year. The term 'rate of levy' as used herein shall include not only those rates the taxing authorities shall be authorized to levy without a vote, but also those rates which have been or may be authorized by elections for additional or special purposes. No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds.

"Section 2. Because the state tax commission has announced that it is going to order a large increase in the assessed valuations of property in many counties in this state which will result in hardship for the citizens of this state unless the rate of levies are correspondingly reduced, and because the present law does not adequately protect the people of this state, and because this act is necessary for the immediate preservation of the public peace, health and safety of the inhabitants of this state, an emergency exists within the meaning of the constitution, and this act shall be in full force and effect from and after its passage and approval."

The emergency clause recites the background and the purpose for the enactment of the bill. The reason for the bill was the announcement of the State Tax Commission that it was going to order a large increase in the assessed valuations in many of the counties which would result in hardship for the citizens of the state unless the tax rates were reduced. The purpose of the bill was to require the various taxing authorities to reduce the rate of levy where the State Tax Commission had ordered such an increase after the rate of levy had been determined by the taxing authority in order to prevent the hardship that would otherwise result to the taxpaying citizens of this state.

We believe that it was the intention of the Legislature that if the assessed valuation was increased by more than ten per cent in part or all of a school district, the district as one of the taxing authorities should reduce its rate of levy as

Honorable John M. Rice

therein specified. Of course, the people in Newton County who are residents of School District No. 6 of Lawrence County will not get the benefit of a full reduction in their tax rates equal to the percentage of the increase in valuation. This is so because the rate of taxation must be uniform for the whole district (Sec. 3, Art. X, Const. of Mo. 1945) and the district is required to reduce its levy only to the rate necessary to produce "substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation." Also, it is provided that no levy for public schools shall be reduced below a point that would entitle the district to participate in state funds.

Considering the bill as a whole, its over-all purpose and the reason for its enactment, we are of the opinion that the school board of School District No. 6 of Lawrence County is required to redetermine and reduce its tax rates based upon the new assessed valuation of the district so as to produce substantially the same amount of taxes as previously estimated to be produced by the original levy, etc.

CONCLUSION

It is the opinion of this office that where the territory of a school district of county number one extends into county number two and the assessed valuation of county number two is increased more than ten per cent by order of the State Tax Commission after the rate of levy for the district has been determined by the school board and the assessed valuation of county number one is not so increased, the school board is required to redetermine its rate of levy on the basis of the new assessed valuation of the district so as to produce substantially the same amount of taxes as previously estimated to be produced by the original levy, etc., in accordance with Senate Bill No. 286, 68th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml:gm

CORPORATIONSE : Upon submitted facts, the entire assets of a
FRANCHISE TAX: : domestic corporation named, are subject to
TAXATION: : Missouri franchise tax.
.....



February 17, 1955

Honorable James M. Robertson
Chairman
Missouri State Tax Commission
Jefferson City, Missouri

Dear Mr. Robertson:

Your letter of November 15, 1954, requesting an
official opinion reads, in part:

"Is a promissory note owned by a domestic corporation drawn and executed by a foreign corporation, at its out-state office, and deposited with collateral securing it at an out-state depository, such an asset as should be considered for the purpose of determining corporation franchise tax liabilities as being employed in this state?

"Conversely then what is the franchise tax status of capital invested and evidenced by notes held in Missouri by a foreign corporation doing business in Missouri, and executed by a domestic corporation?

"We are transmitting herewith a letter received by this department setting forth the factual conditions and arguments out of which this request for your opinion arises."

The enclosed letter to which you refer reads, in part:

"* * * BBC Corporation was formed several years ago for the purpose of organizing, acquiring, operating and otherwise dealing in and with professional baseball clubs.

Honorable James M. Robertson;

Its present assets, as shown in its 1954 Corporation Franchise Tax Report, consist of the following:

Cash and other assets situate within
the State of Missouri \$ 584,147.40

A promissory note situate outside the
State, i.e., on deposit in Illinois
bank, in principal amount of
\$1,200,000., with accrued interest
of \$9,468.49 \$ 1,209,468.49

"The aforesaid note was drawn and executed by
Baltimore Orioles, Inc., a Maryland corporation,
at its offices in the latter state. This is
indicated on the face of the Note, itself. The
instrument also expressly states that it is pay-
able at 231 South LaSalle Street, Chicago,
Illinois.

"Immediately upon delivery to BBC, the note was
deposited, together with collateral securing it,
in the Trust Department of the City National
Bank and Trust Company of Chicago, Illinois.
It has remained there to this date.

"BBC has recently received a franchise tax notice
assessing a tax of \$896.81. The amount of this
assessment, of course, was based upon the inclu-
sion of the note and accrued interest.

"We respectfully submit that the inclusion of
this 'out-of-state' asset was in error. * * *."

Section 147.010, RSMo 1949, makes the following provi-
sion:

"1. For the taxable year of 1943 and thereafter
every corporation of this state organized under
or subject to chapter 351, RSMo 1949 or under any
other laws of this state shall, in addition to
all other fees and taxes now required or paid,
pay an annual franchise tax to the state of
Missouri equal to one-twentieth of one per cent
of the par value of its outstanding shares and
surplus, or if the outstanding shares of such
corporation or any part thereof consist of
shares without par value, then, in that event,

Honorable James M. Robertson:

for the purpose herein contained such shares shall be considered as having a value of five dollars per share unless the actual value of such shares should exceed five dollars per share, in which case the tax shall be levied and collected on the actual value and the surplus. If such corporation employs a part of its outstanding shares in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding shares and surplus employed in this state, and for the purposes of this chapter such corporation shall be deemed to have employed in this state that proportion of its entire outstanding shares and surplus that its property and assets in this state bears to all its property and assets wherever located.

"2. Every foreign corporation engaged in business in this state whether under a certificate of authority issued under chapter 351, RSMo 1949 or not, shall pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding shares and surplus employed in business in this state, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event, for the purposes herein contained, such shares shall be considered as having a value of five dollars per share, unless the actual value of such shares should exceed five dollars per share, in which case the tax shall be levied and collected on the actual value and the surplus, and for the purposes in this chapter such corporation shall be deemed to have employed in this state that portion of its entire outstanding shares and surplus that its property and assets in this state bear to all its property and assets wherever located.

"3. Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this

Honorable James M. Robertson;

state, and insurance companies, which pay an annual tax on their premium receipts in this state; provided, bank deposits shall be considered as funds of the individual depositor, left for safekeeping and shall not be considered in computing the amount of tax collectible under the provisions of this chapter."

The first question to be determined is whether an enforceable promise to pay a domestic corporation, said promise to pay being evidenced by a promissory note, and secured by certain collateral, constitutes "surplus" within the meaning of Section 147.010. In State ex rel. Marquette Hotel Inv. Co. vs. State Tax Commission, 282 Mo. 213, 221 S.W. 721, 723, it is said:

"* * * the Legislature must have intended the word 'surplus' to mean the difference between the amount of the outstanding capital stock of a wholly domestic corporation, such as relator is, and the amount of the assets of that corporation, excluding liabilities of all sorts. * * *."

From the above, we must conclude that an enforceable promise to pay should be considered as "surplus."

The promise to pay, as evidenced by the note, is thus taxable unless "such corporation employs a part of its outstanding shares in business in another state." In that event, the franchise tax may be levied only on that part of the outstanding shares and surplus employed in this state.

In the case of Union Electric Co. vs. Morris, 359 Mo. 564, 222 S.W. (2d) 767, it was held by the Supreme Court of Missouri that shares of stock owned by a Missouri corporation in two Illinois corporations not doing business in Missouri, were not subject to the Missouri franchise tax. The shares were located in Missouri, but the Court indicated that, although the shares were technically the property owned by Union Electric Co., said shares merely represented the money of Union Electric Co. actually employed in two Illinois businesses.

Honorable James M. Robertson:

We deem the above case not to be controlling in the present situation. Here, the domestic corporation has not invested its money in a foreign business. It has merely loaned money to a foreign corporation. Apparently the obligation to pay the loan is absolute, and is not contingent upon the success of the business enterprise, and is not solely payable from the income of the business. Even if the business should fail, the lender can look to assets of the foreign corporation, and the collateral, for the satisfaction of the debt. We conclude that the mere lending of money to a foreign corporation does not constitute "employ(ment) (of) a part of its outstanding shares in business in another state" within the meaning of Section 147.010. That being so, all of the outstanding shares and surplus of the domestic corporation are subject to the franchise tax.

Your second question is too general to be susceptible to a definite answer. The proper determination of what property is subject to the franchise tax is often extremely difficult, since it requires a close analysis of the use made of the corporate property. We suggest that when a concrete situation baffles the Commission, that you may submit to us a detailed factual statement of the operations of the particular corporation. We shall then be happy to render such assistance as we are able.

CONCLUSION

In the premises therefore, it is the opinion of this office that, upon the submitted facts, the entire assets of the domestic corporation, as listed above, are subject to the Missouri franchise tax.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk

MICROWAVE STATIONS:
STATE TAX COMMISSION:



Microwave stations owned or controlled by the American Telephone and Telegraph Company, and the Southwestern Bell Telephone Company, are not distributable property of a public utility to be assessed by the State Tax Commission, but constitute property to be locally assessed under Section 151.100, RSMo 1949.

April 12, 1955

Honorable James M. Robertson, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"This department requests an official opinion from your office determining the status of microwave stations, towers and equipment, with respect to whether they should be assessed as distributable property for purposes of Ad valorem property taxation by the State Tax Commission or as non-distributable property by the local assessors at the situs of the stations and towers.

"In general these units consist of a 20x40-Foot building on one acre of ground. The buildings house central office equipment, switchboards, relays and miscellaneous equipment. The towers are of structural steel extending to a height of about 140-Feet. Placed atop the towers are two receiving and two sending microwave instruments.

"In the event that your department holds the value of any of these properties to be allocable to taxing districts over which the microwaves are beamed, kindly advise as to the method of allocation to be employed by this Commission."

Honorable James M. Robertson

You also verbally inform us that all of these are public utilities, being the property of the American Telephone and Telegraph and the Southwestern Bell Telephone Company.

We would first note that the State Tax Commission is limited to the assessment of public utilities by Paragraph 1 of Section 138.420, RSMo 1949, which reads:

"The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms."

Public utilities are made subject to taxation, and the manner of their taxation is provided by Section 153.030, RSMo 1949. Paragraphs 1 and 2 of that section read as follows:

"1. All bridges over streams dividing this state from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and tangible personal, owned by telegraph, telephone, electric power and light companies, electric transmission lines, pipeline companies and express companies shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons.

"2. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the state tax

Honorable James M. Robertson

commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and state tax commission have or may hereafter be empowered with, in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other authorized officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express companies in like manner as the president, or other authorized officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property."

Since public utilities are to be taxed in the same manner as railroad companies, we turn to Chapter 151, RSMo 1949, and find that the State Tax Commission assessed property of railroad companies by authority of Section 151.060, RSMo 1949, which reads:

"1. The state tax commission shall assess, adjust and equalize the aggregate valuation of the property of each one of the railroad companies in this state specified in section 151.020.

"2. The commission shall have power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the power of a circuit court to compel the attendance of such witnesses, and to compel them to testify; they shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad

Honorable James M. Robertson

company included in the statements and returns made by the railroad companies and the clerks of the county courts, and shall assess, adjust and equalize any other tangible property belonging to said railroad companies, or tangible property belonging to any railroad companies in this state of the kind specified in section 151.020, upon which no returns have been made, which may be otherwise known to them, as they deem just and right.

"3. In assessing, adjusting and equalizing any railroad property for any year or years the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

However, the State Tax Commission may assess only the distributable property of public utilities. In the case of State ex rel. Union Electric Light & Power Co. v. Baker, 316 Mo. 853, 293 S.W. 399, 100 402, the court stated:

"In State ex rel. v. Hannibal & St. J. R. R. Co., 135 Mo. 618, 37 S. W. 532, we referred to the property designated in the first of these two statutes as 'distributable' property, and to that designated in the second as 'local' property. A distinction thus created between these

Honorable James M. Robertson

two classes of property, for purposes of assessment and based upon the nature of the uses to which they are devoted, was indicated in *State ex rel. v. C. R. I. & P. Ry. Co.*, 162 Mo. 391, loc. cit. 394, 63 S. W. 495, 496, as follows:

"The theory of the system of taxing railroads, as contained in our statute, seems to be that the railroad, with all the necessary appurtenances to its efficient equipment as a means of traffic, is to be taken as a whole and assessed for taxation by the state board of equalization. That does not, however, include property that is used by a railroad corporation as a collateral facility to its business, such as workshops, etc., nor property held for purposes other than those of a carrier, all of which is subject to taxation by the local authorities."

Paragraph 1 of Section 151.020, RSMo 1949, reads:

"1. On or before the first day of May in each and every year, the president or any authorized officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state tax commission a statement, duly subscribed and sworn to by said president or other authorized officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable

Honorable James M. Robertson

property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof."

Section 151.100, RSMo 1949 reads:

"All real property, or tangible personal property, including lands, machine and workshops, roundhouses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, and not herein specified, owned or controlled by any railroad company or corporation in this state, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this chapter."

In the case of Nashville Railroad Company v. Patterson, 122 S.W. 467, the Supreme Court of Tennessee stated:

"Switches and industrial tracks off the main right of way, but used as a part of the general system, and for the same purposes as switch tracks on the right of way are used, must be assessed as 'distributable' property, but all buildings, coal bins, roundhouses, machine shops, depot buildings, and other structures located on the terminal yards must be assessed as 'localized' property, within Acts 1897, p. 102, c. 5, requiring railroads to file a schedule setting forth the length in miles of its railroad bed, switches, and side tracks, and the value of the whole, providing that the road of any railroad shall include side tracks, switches, etc., and that the roadbed, rolling stock, franchises, choses in action, and personal property, having no actual situs

Honorable James M. Robertson

shall be known as 'distributable property,' and shall be valued separately, and that the depot buildings and other property, real, personal, and mixed, having an actual situs, shall be known as the 'localized property,' and shall be valued separately. Nashville, C. & St. L. Ry. Co. v. Patterson, 122 S.W. 467, 469. 122 Tenn. 1."

On the basis of the above we believe the microwave stations in question not to be distributable property, but property to be locally assessed.

CONCLUSION

It is the opinion of this department that microwave stations owned or controlled by the American Telephone and Telegraph Company, and the Southwestern Bell Telephone Company, are not distributable property of a public utility to be assessed by the State Tax Commission, but constitute property to be locally assessed under Section 151.100, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW:vlw

TAXATION AND REVENUE: Methods of apportioning distributable
STATE TAX COMMISSION: property of pipeline companies.



June 10, 1955

Honorable James M. Robertson
Chairman, State Tax Commission
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion incorporating the following two questions:

"(1) Should the valuations placed upon second or looping pipe lines be allocated to the same taxing jurisdictions as the original lines, even though they may be laid to pass through other taxing jurisdictions, or should said valuations be apportioned to follow the added lines precisely in conformance with their physical situs?

"(2) Should the valuations placed upon pipe lines be distributed strictly and only on the length of lines or should any valuation adjustment be made by the Commission on account of the varied diameter of the pipe lines?"

Fundamentally, the assessment of pipeline companies and the subsequent apportionment of the distributable property of such companies is to be done in the same manner as railroad companies. In this regard your attention is directed to a portion of Section 153.030, RSMo 1949, reading as follows:

"2. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the state tax commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing

Honorable James M. Robertson

and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and state tax commission have or may hereafter be empowered with, in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other authorized officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express companies in like manner as the president, or other authorized officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property." (Emphasis ours)

In construing an amendment to this statute which first brought within its purview electric light companies, the Supreme Court of Missouri, in *State ex rel. v. Baker*, reported 293 S. W. 399, established the rule that such companies are to be assessed and in other respects treated for taxation in the same manner as railroad companies. Such a result would unquestionably be reached with respect to what are described in the statute as "pipeline companies."

We, therefore, give consideration to Section 151.080, RSMo 1949, relating to the apportionment of the valuation fixed for the distributable property of railroad companies, inasmuch as such statute and the cases decided thereunder must serve to guide the State Tax Commission in the discharge of its duties with respect to pipeline companies. This statute reads as follows, providing for apportionment:

"* * * * * according to the ratio which the number of miles of such road completed in such county, municipal township, city or incorporated town, special road district, public water supply, fire protection and sewer districts or subdivision,

Honorable James M. Robertson

except school districts, in which such road is located, shall bear to the whole length of such road in this state; * * * * *

In discussing the propriety of applying the mileage basis ratio to the aggregate valuation of such property for the purpose of establishing a basis of apportionment, our Supreme Court said this in *State ex rel. Murphy v. Stone*, reported 119 Mo. 668, l. c. 675-7:

"While it is necessary that the board should be advised in detail of the items, quantity, situation and value of the property which go to make up the entire thing, the value of which they are to assess, and for this purpose reports from the companies and from the county clerks are required to be made in detail, the power to assess for purposes of taxation is limited to the valuation of the property as an aggregate and can not be applied to divisible parts, whether by county boundaries or otherwise." Washington County v. Railroad, 58 Mo. 372.

"After the board has ascertained the value of this thing made up of tracks, depots, water tanks, turntables, rolling stock, etc., known in common parlance, and denominated in this statute as a railroad, they are to apportion that value among the several municipalities of the state, in which any part of this whole thing is located by a certain standard in length--a mile--a mile of what? There can be but one answer. A mile of that thing called a railroad, made up of the items mentioned, in section 7718, the value of which as a whole is to be apportioned for such purpose. The number of miles of the railroad in this state, or within any municipal subdivision thereof is not to be measured by the length of its main tracks, or of its main track and side tracks combined, any more than it is to be measured by the combined length of its main tracks, side

Honorable James M. Robertson

tracks, rolling stock and the other property which go to make up the road value to be apportioned. It is the length of the whole thing, a railroad, which these several constituents, in place, go to make up, that is to be measured. Its length between its terminal points in this state, and its length in the several municipal subdivisions of the state is to be ascertained, and its value apportioned to each of said municipalities in the ratio that its length in the municipality bears to its whole length in the state. This is the obvious meaning of the statute, and the construction that has been placed upon it by the board of equalization from the beginning.

"While the precise question in this case has not been passed upon directly by this court, yet what has been ruled and said in cases that have come before it in which this statute was considered, and bearing indirectly upon this question, tend only to support this construction. See Washington County v. Railroad, supra; State ex rel. v. Severance, 55 Mo. 378; In matter of Apportionment of Taxes, 78 Mo. 596; State ex rel v. Railroad, 92 Mo. 137; State ex rel. v. Richardson, 97 Mo. 348; State ex rel. v. Railroad, 117 Mo. 1. The interpretation is so plain, however, that it does not need the support of authority." (Emphasis ours)

It will be observed that, in the above case, the Supreme Court of Missouri has definitely approved the "mileage basis" as the proper one for apportioning the valuation of distributable property of railroads. With such approval has been coupled the directive that such aggregate valuation is to be apportioned to those municipal subdivisions of the state within which any portion of such miles is located. It is our thought that a similar result should be reached by the State Tax Commission in apportioning the aggregate valuations of the distributable property of pipeline companies which, for purposes of taxation, are to be treated in the same manner as railroad

Honorable James M. Robertson

companies, as pointed out supra.

Your second question relates to the power of the State Tax Commission to deviate within various taxing jurisdictions from the average mile valuation resulting from the application of the mileage ratio. We do not believe that such a course is proper to be followed on the part of the Commission.

In *State ex rel. v. Railroads*, reported 215 Mo. 479, the contention was made on behalf of a taxing jurisdiction that the entire valuation of a bridge should be allocated to such taxing jurisdiction wherein located. It was shown that the bridge was of an approximate value of \$150,000, whereas such taxing jurisdiction under an apportionment under the mileage rule would receive a taxable valuation of not to exceed \$5,000. However, the Court rejected the contention of the taxing jurisdiction, using the following language, l. c. 494-6:

"The final insistence of counsel for respondent is that if the bridge in question is to be assessed under sections 9338 and 9339, Revised Statutes 1899, according to what is known as the 'mileage rule,' and not under section 9387, as contended for by the appellants, then the bridge will be assessed for almost a nominal sum, namely \$5,000; while, if assessed under the last section, the assessed value thereof would be \$150,000, which would result in great injustice to the respondent and practically exempt the bridge from taxation.

"In our judgment that insistence is not sound, for, in the first place, when the bridge is treated as a part of the roadway, then the entire road is assessed according to the mileage rule, and the total value of the bridge is taken into consideration and constitutes one of the elements which go to make up the total assessable value of the road, and when the total value is divided by the number of miles the road is in length, the value

Honorable James M. Robertson

of the bridge is equally distributed along the entire length of the road; and when the railroad company pays its taxes, each county through which it passes receives its proportional part thereof instead of paying the entire taxes assessed against it to the county in which the bridge is located.

"In the second place, if we view the matter from a standpoint of absolute justice and equity, then all non-toll railroad bridges should not be considered at all in fixing the value of railroads for assessment purposes, whatever their size or cost of construction may have been, except in so far as they constitute so many feet or miles of the road to be assessed. Such bridges have no more intrinsic or commercial value than the same number of feet of road constructed by it over a perfectly level prairie country and where the cost of construction was perhaps not more than one-thousandth part as much as was the cost of constructing the bridge. In fact, it is not so valuable as the latter, for several reasons: (1) there is not so much idle money tied up in the latter; (2) the expenses of maintaining the latter are not near so great; (3) the trains can run faster over the latter and much safer than over the former; and (4) the company has no legal right to charge any more for carrying freight and passengers over the bridge than it has for carrying them the same distance over the perfectly level portion of their road. Under the law of this State the cost of constructing and maintaining railroads is not taken into consideration in fixing the tariffs the companies may charge for the transportation of freight and passengers over their lines -- that is, no railroad of the same class can lawfully charge higher tariffs than the legal schedule, even though its cost of construction may have been double the cost of the construction of some other road of

Honorable James M. Robertson

the same class; and that being true, why should the bridge be assessed at a higher value per foot or mile than any other portion of the road? We are unable to see any sound reasons therefor. That, however, is a matter over which we have no control--it belongs to the lawmaking power of the State and not to the judiciary."

The constitutionality of such procedure had previously been established in the Murphy case cited supra, wherein our Supreme Court said, 1. c. 677-679:

"It is undoubtedly true, of this scheme of assessment, as was said in Washington Co. v. Railroad, supra, that 'one county may contain railroad property worth far more than that within another and may yet receive a smaller apportionment for taxation by reason of having a less number of miles of road completed within its limits.' And this feature of it forms the burden of the petitioner's complaint, and the reason urged why the construction contended for by the petitioners, should be put upon the statute, by which the length of the road in the state is to be measured, not by its tracks in place, but by adding the length of the side tracks to the length of the main tracks, in order, as it is said, that the statute may not become obnoxious to the constitutional provision contained in article 10, section 3, requiring that all taxes 'shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.'

"If this scheme for the assessment of distributable railroad property is unconstitutional, it is not seen how the removal, by construction, of any irregularity in the apportionment of the value of side tracks could relieve it of constitutional features, since these constitute but a part of the property

Honorable James M. Robertson

value distributable under its provisions for the purposes of taxation, without regard to its particular situs. The statute as it reads, and as we have construed it, is either constitutional or unconstitutional, and its meaning can not be changed by a forced construction for any purpose.

* * * * *

"The arguments made here in support of the petitioner's construction of this act, may furnish reasons for a different, and, as is contended, a more equitable distribution of the assessed value of railroad property, which, with propriety, might be addressed to the legislature for a change in the law, but they can not change the plain meaning of that law, nor do they furnish substantial ground for questioning its constitutionality.
* * * * * " (Emphasis ours)

CONCLUSION

In the premises, we are of the opinion:

(1) That the State Tax Commission should apportion the aggregate valuation placed upon the distributable property of pipeline companies to those taxing jurisdictions through which any line of such company passes and,

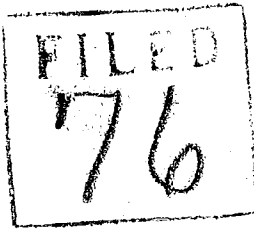
(2) That such valuations should be apportioned in strict adherence to a mileage ratio basis without regard to varying sizes of pipe, type or kind of equipment, or actual valuation found in the taxing jurisdiction through which the lines pass.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

John M. Dalton,
Attorney General

ASSESSMENT OF PROPERTY:



June 15, 1955

: 1) Partially completed buildings or other
: structures on real estate are subject to ad
: valorem assessment; 2) Partially completed
: structures on real estate should be assessed
: against and in the name of the owner of land
: as real property; 3) Materials purchased by
: the owner for construction of a building
: which have not been used by the contractor,
: and have not yet become a part of the build-
: ing, or a part of the realty, should be
: taxed in the name of the owner; 4) The
: assessment of buildings or other improvements
: under construction, as in our answer to
: question No. 2, should be assessed in the
: name of the owner as real property.

.....

Honorable James M. Robertson
Chairman
State Tax Commission of Missouri
Jefferson Building
Jefferson City, Missouri

Dear Chairman Robertson:

This will be in compliance with your request for the opinion of this office on the questions noted in the request relating to the assessment of property in this State by local assessors.

Your request reads as follows:

"The State Tax Commission is frequently called upon by local assessors for advice in connection with the propriety of assessing certain property. Among other such instances our advice is requested with regard to the assessment of buildings and other improvements which are only partially completed on the first day of the calendar year.

"Your official opinion is, therefore, respectfully requested upon the following questions:

"(1) Are such partially completed structures or other improvements subject to ad valorem assessment?

"(2) Assuming that such structures or other improvements are being built under contract with owner of the real property upon which situated, such contract contemplating the delivery of

Honorable James M. Robertson:

such structures or other improvements as a complete unit, should such assessment be in the name of the contractor or the owner of the real property?

"(3) In the event the owner of the real property purchases necessary materials for such structures or other improvements and merely contracts for the labor involved in construction, or hires such construction done through employees, should the assessment be against the owner of the real property?

"(4) Assuming the answer to No. (2) to be that such assessment should be against the contractor, should such structures or other improvements be assessed as real or personal property?"

Your first question states:

"(1) Are such partially completed structures or other improvements subject to ad valorem assessment?"

The last sentence of Section 3 of Article X of the present Constitution of this State, respecting the method of taxation of property in this State provides:

"* * * Except as otherwise provided in this Constitution, the methods of determining the value of property for taxation shall be fixed by law. "

The Constitution of Missouri and appropriately harmonious enactments of general law on this subject connected therewith provide for the classification of taxable property in this State.

Section 4(a) of Article X of our Constitution of 1945, as the basic law providing for such classification, and fixing the classes into which property of various kinds are placed, reads, in part, as follows:

"All taxable property shall be classified for tax purposes as follows: Class 1, real

Honorable James M. Robertson:

property; Class 2, tangible personal property;
Class 3, intangible personal property. * * *."

Section 137.015, RSMo 1949, following the constitutional provision of said Section 4(a) of Article X, likewise has defined property by classes for purposes of taxation. That section, reads, in part, as follows:

"All property in Missouri shall be classified for tax purposes as follows: Class one, real property; class two, tangible personal property; * * *."

Section 137.010, RSMo 1949, in paragraph (2), defines real property as follows:

"(2) 'Real property' includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto; "

Section 4(b) of Article X of the Constitution of 1945, fixing the basis of the assessment of tangible property for tax purposes provides the following:

"Property in Classes 1 and 2 and subclasses of Class 2, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass of Class 2. * * *."

Section 137.115, RSMo 1949, providing the period of time, the method to be followed and the value to be placed upon real and tangible personal property in such assessment, reads as follows:

"1. After receiving the necessary forms the assessor or his deputy or deputies shall, except in the city of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: He shall call at the office, place of doing business

Honorable James M. Robertson:

or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, except merchandise which may be required to pay a license tax and except all other property which may be exempted by law from taxation.

"2. The person listing the property shall enter a true or correct statement of such property, in a printed blank prepared for that purpose, which statement after being filled out shall be signed and either affirmed or sworn to as provided in section 137.155. The list shall then be delivered to the assessor."

Section 137.075, RSMo 1949, defining property liable for taxation on January 1 of each year subject to taxation states:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

The provisions in said Section 4(b) of Article X fixing the basis of assessment of property for tax purposes at its value "or such percentage of its value as may be fixed by law" mean and refer to the values of property as fixed by the county assessors of this State under Section 137.115, supra. The basis for levying taxes (the assessment) fixed by the value of property is determined by the county assessor. The Supreme Court of Missouri in *Building Co. vs. The City of St. Joseph, et al.*, 108 Mo. 304, holding that the basis for the levy of taxes was the value fixed by the county assessor on certain lots and all of the improvements thereon, 1.c. 309, said:

"The basis for the levy of taxes for state and county purposes on the two lots in question, for the year 1889, as well as for the year 1888, was fixed, by the valuation placed upon them by the county assessor in June, 1887, at the sum of \$21,000. Such valuation by the

Honorable James M. Robertson:

plain terms of the statute included the lots and all the improvements thereon. * * *."

The Supreme Court of Missouri in State ex rel. Thompson, State Auditor, et al. vs. County Clerk, Shelby County, 320 Mo. 1164, defined the meaning of "value" as used in Section 12802, R.S. Mo. 1919, now Section 137.115, to be as fixed by the county assessor in the assessment of real estate and personal property "at its true value in money at the time of the assessment." The Court in ruling said question, l.c. 1168, 1169, said:

"* * * The 'values' mentioned in the statutes are the valuations of the officials whose duty it is to make them. Land is not like commodities which have a fixed market price at a given period. Its value is determined always by the estimate of the party who values it. The requirement of Section 12802, that the assessor assess the property at its true value in money, means nothing more than that such true value is his estimate; his valuation. The law contemplates that, in accordance with that section, he does assess it at its true value as he judges it. * * *."

That case and other decisions by the Appellate Courts of this State hold "values" to mean the value placed on property by an official whose duty it is to make the assessment.

For the purposes of general taxation, land and buildings thereon are treated as a unit. They are all taxable as real property under class one as fixed by the Constitution and the statutes of this State. The Appellate Courts in this State have so held in numerous cases. The St. Louis Court of Appeals in Mound City Constr. Co. vs. Macgurn, 97 Mo. App. Rep. 403, on this question, l.c. 408, 409, held as follows:

"It can not be denied (and it is conceded by the learned counsel for appellants) that the word 'property' often includes buildings thereon, according to the definition of that word by Worcester, Webster and Bouvier (Rawle's Ed.) and that the term 'real property' includes not merely

Honorable James M. Robertson:

land but whatever is permanently affixed thereto. The contention of appellants is that the term 'property' was not intended to possess so wide a meaning in the connection in which it appears in that part of the charter which must now be construed.

"We think, however, that the language of that section can not be properly severed from the terms of the General Revenue Act of 1872, above quoted, which was part of the law of Missouri when the charter of St. Louis of 1876 was adopted. For the purposes of general taxation the land and the buildings thereon are treated by our law as a unit. It matters not that by custom in the city of St. Louis the assessor separately mentions the value of the improvements. * * *."

Recognizing the unit rule applied by the courts in the assessment of land and buildings or improvements thereon, for tax purposes, as real property, the Supreme Court of Missouri in *State ex rel. vs. Mission Free School, et al.*, 162 Mo. 332, 1.c. 337, ruled as follows:

"* * * All property except such as is specifically exempted by the Constitution and the statute made in pursuance thereof, is subject to taxation, and we can see no difficulty in assessing the separate and distinct property of Thompson in this building any more than would be encountered in assessing the property of any other individual. Whether it is real or personal property, or whether the State is bound to regard it as personalty, is not now the question. The point is, is it separately liable to taxation as his property? We hold that it is. And it is Thompson's duty to list it just as every other taxpayer is required to list his property or suffer the penalties. The

Honorable James M. Robertson:

point may be new in this court, but has often been solved in other jurisdictions. (People ex rel. Muller v. Board of Assessors, 93 New York, 308; People ex rel. v. Commrs. of Taxes, 82 N.Y. 459; Russell v. City of New Haven, 51 Conn. 259; Smith v. Mayor, 68 N.Y. 552.)

"In most States the interest of Thompson under a lease like this is real estate, and as our statute provides that the words 'real estate' shall be construed to include all interest and estate in lands, tenements, and hereditaments (sections 4917 and 4916, Revised Statutes 1889), little doubt can exist that Thompson's interest in this realty and building should be assessed as real estate. * * *."

61 C.J. 182 under the subject of "Taxation" states:

"Partially constructed buildings have been held taxable."

Footnote 73 to this text cites numerous cases decided by the courts of last resort in other jurisdictions in support of the text quoted. We shall here cite some of such cases so expressly holding:

The Maryland Court of Appeals, reported 68 Atl. 23, in *Hamburger vs. Mayor, et al.*, construing an ordinance of the City of Baltimore requiring the assessment for tax purposes of " * * * all new improvements finished on or before the first day of October of every year; the said improvements to be construed as finished, when plastering and inside woodwork are completed." * * *. In discussing the facts on which the court made its decision that while the plastering and inside woodwork of the building were not entirely completed on October 1st they were substantially completed then. The court holding such structure taxable although only partially completed, 1.c. 25, said:

"* * * We are of the opinion that the ordinance must be construed to mean that new

Honorable James M. Robertson:

improvements are to be assessed when the plastering and inside woodwork are substantially completed by October 1st, and that this record shows they were in this instance. There was a formal opening of the building on November 1, 1906, two months before the period began for which the taxes were to be paid, and on October 6th the appellants began the installation of the store fixtures, although the building was not then entirely completed. One hundred and fifty thousand dollars (the amount fixed by the court at which the property was to be assessed) had actually been expended by October 1st, and, while there was still some work to be done on the plastering and inside woodwork on and after that date, it was not of a character to justify us in holding that it was not completed within the meaning of the ordinance. * * *."

A like tax case involving an uncompleted apartment house as subject to taxation as real property was decided by the Supreme Court of Louisiana. The partially completed structure was held taxable. The case, *Esto Real Estate Commission vs. Louisiana Tax Commission, et al.*, is reported in 129 So. 117, (170 La. 649). The court in holding the property taxable as real estate, l.c. 117, 118, said:

"* * * There is no reason why the incomplete building should not have been assessed for taxes as a part of the real estate. * * *."

"* * * In the present case the building was under construction on the 1st day of January of the year in which it was assessed for taxes, and it was properly assessed at the value which it was supposed to have had on the 1st day of January of that year. * * *."

Valdez vs. City of Laredo was before the Court of Civil Appeals of Texas, reported 29 S.W. (2d) 802, on the

Honorable James M. Robertson:

question of whether an opera house partially completed in November 1917 was liable to assessment for taxes as of January 1st following, as a completed structure, although Valdez asserted the building was not entirely completed by January 1st, 1917. The court holding the property liable to assessment for taxation in 1917, l.c. 802, said:

"* * * The building in question was constructed as an 'opera house.' It was so far completed by the middle of November, 1916, as to constitute such building, for at that time appellant obtained a permit or license for its use as such, and in fact then began operating it as an opera house, and continuously thereafter operated it for that purpose. Therefore, even under appellant's own contention it constituted a completed structure, and was properly taxed."

These last above-noted cases were based upon statutes, and in one case an ordinance, of the same or similar import as are the provisions of Section 137.010, RSMo 1949, supra, to include as real property, among other elements of its tax status, buildings, structures, improvements and fixtures of whatever kind thereon. That section and the authorities we have cited, construing its terms, and terms of similar statutes in other states, bring such partially completed structures, as real estate, definitely, for tax purposes, into class one. We believe the terms of paragraph 2 of Section 137.010, supra, are sufficiently comprehensive in their scope to include partially completed structures as taxable, where the section defines "improvements and fixtures of whatever kind thereon", as items constituting real property.

As we view the constitutional and statutory provisions cited, and the decisions of the courts construing them in fixing classes of property and fixing the basis of assessment for tax purposes, referring to that part of said Section 3 of Article X quoted, we believe they mean and intend to mean that the only method fixed by law for determining the value of property is the valuation fixed by the county assessor in making the list of the property of the owner. Therefore, we believe and hold that, answering your first question, partially completed structures or other improvements on land must be and are subject to ad valorem assessment.

Honorable James M. Robertson:

Your second question is:

"(2) Assuming that such structures or other improvements are being built under contract with owner of the real property upon which situated, such contract contemplating the delivery of such structures or other improvements as a complete unit, should such assessment be in the name of the contractor or the owner of the real property?"

We do not find any case involving this direct question in the decisions of the Appellate Courts of this State. We refer you, however, in answering this question, to the Louisiana case, cited and quoted at page eight supra, where we were discussing the first question in the request. The decision in that case based upon like facts as are assumed to exist in your second question, is persuasive here, and supports our belief on the point, and it is, therefore, the opinion of this office, that partially constructed buildings should be assessed against and in the name of the owner of the land upon which such buildings or improvements are being constructed.

Your third question states:

"(3) In the event the owner of the real property purchases necessary materials for such structures or other improvements and merely contracts for the labor involved in construction, or hires such construction done through employees, should the assessment be against the owner of the real property?"

It is apparent, we believe, that when the owner of real property provides the materials necessary for the construction of a building or for other improvements and contracts for the labor involved in construction, or hires such construction done through employees, such materials as have not been used in the construction of the building and have not yet become a part of the building, and therefore, not a part of the realty, should be taxed against and in the name of the owner as personal property.

Honorable James M. Robertson:

Question No. 4 states:

"(4) Assuming the answer to No. (2) to be that such assessment should be against the contractor, should such structures or other improvements be assessed as real or personal property?"

We do not believe that it may be assumed, as stated in your second question that, as a basis for answering Question 4, the assessment should be against the contractor, as so held in our answer to Question 2. It is the opinion of this office, and we have held in answering your second question, citing the Louisiana case, *supra*, that partially completed buildings, structures and improvements shall be taxed as a unit with the real estate upon which such structures are being erected, against and in the name of the owner of the real estate. There is, therefore, no question of the taxation of personal property involved in this question.

CONCLUSION

Considering the premises, it is the opinion of this office that:

1) Partially completed buildings or other structures on real estate are subject to ad valorem assessment;

2) The assessment of the structures under Question No. 2 should be in the name of the owner of the land as real property;

3) The assessment of the materials under Question No. 3 should be against the owner as personal property, and,

4) The assessment of the structures or other improvements under construction under Question No. 4 should be assessed in the name of the owner as real property.

Honorable James M. Robertson:

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON
Attorney General

GWC:irk

DIVISION OF FINANCE: Proposed agreement may conflict with Section
362.170, RSMo 1949.



February 1, 1955

Honorable J. A. Rouveyrol
Commissioner of Finance
Department of Business
and Administration
Jefferson City, Missouri

Dear Sir: C

This will acknowledge receipt of your request to examine the following proposed form of Repurchase and Reserve Agreement and render an opinion as to whether or not the execution of said agreement could possibly place some line of credit in excess of the legal limit as provided by Section 362.170, RSMo 1949. Said agreement reads:

"1. We desire you to assist us in the sale and distribution of new and used passenger and/or commercial automobiles herein call "cars" by the purchase from time to time of notes, chattel mortgages, conditional sale contracts, lease agreements or other security instruments herein called "notes", if acceptable to you that we so acquire from retail purchasers of such cars as evidence of the deferred balance owing thereon, said notes to be endorsed by us "Without Recourse" and to be purchased by you under your regular time sales plan in effect from time to time.

"2. In consideration of your acquiring from us from time to time obligations of retail purchasers of automobiles and paying us for the same without delaying to make your usual credit investigation of the purchaser, we agree to repurchase from you immediately upon demand and for the amount you paid for same, such of said obligations as

Honorable J. A. Rouveyrol

may, upon subsequent investigation, prove unsatisfactory to you. This shall be a continuing agreement by us."

We gather from your request that automobile dealers desire banks to assist them in sale and distribution of passenger cars as well as commercial vehicles in this manner, by purchasing from time to time, notes, chattel mortgages, conditional sale contracts, lease agreements and that said auto dealers may have acquired from retail purchasers of motor vehicles, as balance owed thereon on purchase of said motor vehicles, said notes to be endorsed without recourse, which notes, etc., will be purchased by said bank under a regular time sales plan in effect.

In consideration of the bank's acquiring said notes, etc., without the necessity of the usual credit investigation, the auto dealer agrees to repurchase upon demand of said bank, immediately, any purchase the bank subsequently upon investigation proves unsatisfactory to said bank. (It is a continuing agreement).

Then said agreement further specifies that each note shall be subject to 6% discount of its face value, and that a reserve will be set up as a specific loss reserve to absorb losses that should occur in purchase of any note by said bank. Furthermore, the automobile dealers agree to furnish life insurance on the maker of notes or other obligations, according to the schedule of rate provided by said bank and adequate insurance coverage.

Section 362.170, RSMo 1949, reads, in part, as follows:

"A bank subject to the provisions of this chapter:

"1. Shall not directly or indirectly lend to any individual, partnership, corporation, or body politic, either by means of letter of credit, by acceptance of drafts or by discount or purchase of notes, bills of exchange, or other obligations of such individual, partnership, corporation or body politic an amount or amounts in the aggregate which will exceed fifteen per cent of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of one hundred thousand or over; twenty per cent of the capital stock actually paid in and surplus fund of such bank if located in a city having a population of

Honorable J. A. Rouveyrol

less than one hundred thousand and over seven thousand; and twenty-five per cent of the capital stock actually paid in and surplus fund of such bank is located elsewhere in the state, with the following exceptions:

* * * * *

There is a possibility that such purchase of notes and other obligations mentioned in your request might exceed the maximum legal limits any bank may purchase, discount or loan money under and by virtue of Section 362.170, RSMo 1949. It appears to be a fair agreement and for the most part complies with the law. However, I believe it is possible that in complying with the terms of the proposed agreement, it may exceed in the aggregate 15%, or whatever percentage as may be determined by population of the city wherein said bank may be located, as provided by Section 362.170, supra, of capital stock actually paid and surplus fund of such bank. In such case there would be a violation of said statute. If such agreement could be written so as to fix a limitation of such purchases on loans to comply with the foregoing maximums required by law, and we believe it can be done, then the agreement would constitute a valid obligation under the laws of Missouri.

CONCLUSION

It is therefore the opinion of this department that this agreement might possibly violate the provisions of Section 362.170, supra, especially with respect to the maximum limit to which a bank may purchase, discount or loan money thereunder, if this agreement could be amended so as to confine the maximum limit which such banks may discount or loan money, to that provided under Section 362.170, supra, then we are of the opinion the agreement would be valid, otherwise it does not comply with the law and is invalid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Aubrey R. Hammett, Jr.

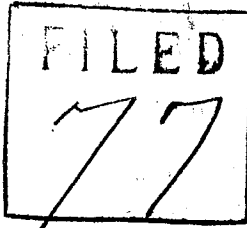
Yours very truly,

ARH, Jr.:vlwida

JOHN M. DALTON
Attorney General

CREDIT UNIONS:

Proposed plan to separate and exchange accounts of two credit unions may not be carried out in view of Section 370.340 RSMo 1949 which specifically covers expulsion and withdrawal of members.



April 29, 1955

Honorable J. A. Rouveyrol
Commissioner of the Division of Finance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Mr. Rouveyrol:

The following opinion is rendered in reply to your request that this office review a proposed plan to separate credit union accounts of two credit unions, namely, Clayton-Brownbilt Credit Union, and Brownbilt Credit Union. The proposed plan would involve eight steps, as outlined in your letter of February 25, 1955, in the following language:

- "No. 1 Transfer all share accounts now held in the Brownbilt Credit Union by employees at the Clayton office to the Clayton Brownbilt Credit Union.
- No. 2 Transfer all loan accounts now held in the Brownbilt Credit Union by employees of the Clayton office to the Clayton Brownbilt Credit Union.
- No. 3 Transfer all interest on loans applicable to the above loan accounts from October 1, 1954 to date of separation to Clayton Brownbilt Credit Union.
- No. 4 Determine the ratio or percentage of loans held by the members at Clayton to the total amount of loans in the Brownbilt Credit

Honorable J. A. Rouveyrol

Union, and transfer a like percentage of the reserve fund to the Clayton Brownbilt Credit Union.

- No. 5 Determine the ratio or percentage of shares held by the members at Clayton to the total amount of shares in the Brownbilt Credit Union and transfer a like percentage of the undivided earnings account to the Clayton Brownbilt Credit Union.
- No. 6 Transfer from the reserve fund of the Brownbilt Credit Union the amount of entrance fees at 25¢ each to cover all members accounts transferred who do not at present have an account in the Clayton Brownbilt Credit Union.
- No. 7 Transfer necessary cash or bonds less an agreeable amount of expenses from the Brownbilt Credit Union to the Clayton Brownbilt Credit Union to cover the shares, reserve fund, undivided earnings, entrance fees, and insurance.
- No. 8 Transfer that portion of prepaid loan insurance collected on loans being transferred from the Brownbilt Credit Union to the Clayton Brownbilt Credit Union."

Credit unions are creatures of statute law and in Missouri they are specifically governed by Chapter 370 RSMo 1949. Section 370.040 RSMo 1949 sets forth preliminary steps to be taken by organizers of a credit union, and when such requirements are met and a certificate of organization is issued, the statute provides:

"4. Thereupon the organizers shall become and be created a corporation under the name used in the certificate of organization."

Honorable J. A. Rouveyrol

To dispel any doubt as to the corporate character of a credit union we may look to Section 351.690 RSMo 1949, a statute in The General and Business Corporation Law of Missouri, for appropriate reference to this type of corporation in the following language:

"(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, co-operative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies and exposition companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); * * *."

The proposed plan to separate credit union accounts, in the two credit unions with which we are dealing, will necessarily involve the withdrawing of members from one credit union and taking up membership in another credit union. Section 370.340 RSMo 1949 treats of the expulsion and withdrawal of members of a credit union, and provides:

"1. At any regularly called meeting the members, by a two-thirds vote of those present, may expel from the credit union any member thereof.

"2. A member may withdraw from a credit union, as herein provided, by filing a written notice of such intention.

"3. The share balance of an expelled or withdrawing member with any dividends credited to his shares to the date of expulsion, or withdrawal shall be paid to said member but only as funds therefor become available, and, after deducting any amounts due to the credit union by said member. The share balance of an expelled or withdrawing member, with any dividends credited to his shares shall be paid to such member, subject to sixty days' notice, and after deducting any amounts due to the credit union by said member.

Honorable J. A. Rouveyrol

"4. Said member, when withdrawing shares shall have no further right in said credit union or to any of its benefits, but such expulsion or withdrawal shall not operate to relieve such member from any remaining liability to the credit union."

The above quoted statute on withdrawal and expulsion of members discloses a legislative policy in definite language regarding disposition of share balances and interest of withdrawing or expelled members of a credit union. The transfer of loan and share accounts of members of one credit union to members of another credit union is not contemplated by the statute being construed. A review of the plan of separation of accounts submitted in this instance cannot be harmonized with the specific and applicable language of Section 370.340, RSMo 1949. In Mutual Bank & Trust Co. v. Shaffner, 248 S.W. (2d) 585, 1.c. 589, the Supreme Court of Missouri referred to the rule on corporate powers in the following language:

"The parties agree that 'the settled rule is that a corporation possesses only such powers as are expressed or fairly implied in the statute by or under which it is created'. Hanlon Millinery Co. v. Mississippi Valley Trust Co., 251 Mo. 553, 158 S.W. 359, 363. They also agree that implied powers 'are defined to be those possessed by a corporation, not indispensably necessary to carry into effect others expressly granted, and comprise all that are appropriate, convenient, and suitable for that purpose, including as an incidental right a reasonable choice of the means to be employed in putting into practical effect this class of powers.' * * *."

To attempt to draw on implied powers in order to allow the separation of credit union accounts under the proposed plan would be an attempt to substitute a plan different from that spelled out in the applicable statute and would amount to legislation rather than interpretation of the law.

CONCLUSION

It is the opinion of this office that a proposed plan to separate and exchange accounts of two credit unions

Honorable J. A. Rouveyrol

operating under Chapter 370 RSMo 1949 may not be carried out in view of Section 370.340 RSMo 1949, which specifically covers expulsion and withdrawal of members.

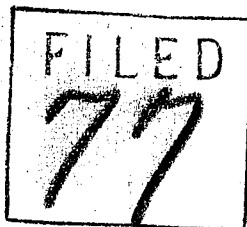
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

BANKS: Banks and Trust Companies liable for
TRUST COMPANIES: incorporation fees, and fees upon
CORPORATIONS: increase of stock, as required by Section 351.065 RSMo 1949.



August 12, 1955

Honorable J. A. Rouveyrol
Commissioner, Division of Finance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Rouveyrol:

This opinion is rendered in answer to your inquiry reading as follows:

"Under Section 362.030, RSMo 1949, applicable to banks, this Division has, for many years, required payment of the 'incorporation tax or fee' prescribed by Section 351.065, RSMo 1949, and like payment has been required when a bank amended its articles of incorporation by increasing its stock. Trust companies have been accorded similar treatment by this Division. In some cases these charges are of substantial amounts.

"One of the trust companies in this state recently declared a substantial stock dividend and when we billed the trust company for our usual fee, the trust company questioned our authority for so doing. Their counsel stated that he knew of no section in the banking law which covered these charges.

"May I have your opinion as to whether or not we are justified in making these charges."

Sections 362.030 RSMo 1949, Cumulative Supplement, 1953, relating to incorporation of banks, states at what stage of incorporation the commissioner of finance is to conduct his initial investigation as a condition precedent to issuance of a certificate of incorporation. Such statute provides, in part, as follows:

Honorable J. A. Rouveyrol

"When any bank shall have filed with the commissioner a certified copy of its articles of agreement and shall have paid all incorporation and other fees in full, as required by law, and shall have provided the cash required by law, the commissioner shall, before such bank shall complete its incorporation, examine or cause an examination to be made," etc. (Underscoring supplied).

Section 363.050 RSMo 1949, relating to incorporation of trust companies, contains language identical to that quoted above from Section 362.030 RSMo 1949, Cumulative Supplement, 1953.

Section 362.325 RSMo 1949 makes provision for an incorporated bank to amend its charter and thereby increase its capital stock. Under this statute a statement of corporate proceedings looking to the increase in capital stock is required to be filed with the commissioner of finance as a condition precedent to his issuance of a certificate of compliance. Subparagraph 5 of said Section 362.325 RSMo 1949, provides:

"Upon the filing of such certified copy the commissioner shall promptly satisfy himself that there has been a compliance in good faith with all the requirements of the law relating to such increase or change, and when he is so satisfied he shall issue a certificate that such bank has complied with the law made and provided for the increase of capital stock, and the amount to which such capital stock has been increased or for the change in the length of its corporate life or any other change provided for in this section. Thereupon, the capital stock of such bank shall be increased to the amount specified in such certificate or the length of the corporate life of the bank shall be changed or other authorized change made as specified in such certificate. Such certificate, or certified copies thereof, shall be taken in all courts of the state as evidence of such increase or change." (Underscoring supplied).

Honorable J. A. Hoveyrol

Section 363.520 RSMo 1949, applicable to trust companies, provides for a like statement of corporate proceedings to be filed with the commissioner of finance as a condition precedent to his issuance of a certificate of compliance touching an amendment increasing capital stock, and the commissioner of finance, under said statute:

"* * * shall promptly satisfy himself that there has been a compliance in good faith with all the requirements of the law relating to such increase or decrease, or extending or changing its business as aforesaid, or availing itself of the privileges and provisions of this chapter, and when he is so satisfied he shall thereupon issue a certificate that such trust company has complied with the law made and provided for the increase or decrease of capital stock, as the case may be, and the amount to which such capital stock is increased or decreased; and such certificate or certified copies thereof shall be taken in all the courts of this state as evidence of such increase or decrease of stock; * * *"
(Underscoring supplied).

The foregoing quotations from Sections 362.030, 362.325, 353.050 and 363.520 RSMo 1949, clearly disclose the fact that the legislature, in treating the subjects of banks and trust companies has taken cognizance of the fact that banks and trust companies are corporations which issue stock and increase the same and are amenable to a general law on the subject of such stock issuance and increase thereof. Such law is to be found in Section 351.065 RSMo 1949, which provides, in part, as follows:

"1. No corporation shall be organized under the general and business corporation law of Missouri unless the persons named as incorporators shall at or before the filing of the articles of incorporation pay to the director of revenue fifty dollars for the first thirty thousand dollars or less of the authorized shares of such corporation and a further sum of five dollars for each additional ten thousand dollars of its authorized shares, and no increase in the authorized shares of such corporation shall be valid or effectual until such corporation shall have paid the

Honorable J. A. Rouveyrol

director of revenue five dollars for each ten thousand dollars or less of such increase in the authorized shares of such corporation, and it shall be the duty of said corporation to file a duplicate receipt of the director of revenue for the payments herein required to be made with the secretary of state for the filing of articles of incorporation; provided, that the requirements of this section to pay incorporation taxes and fees shall not apply to foreign railroad corporations which have heretofore built their lines of railway into or through this state."

To briefly put the question to be resolved in this opinion:

Is Section 351.065 RSMo 1949 of the General and Business Corporation Law of Missouri (L.1943 p. 410) applicable to banks and trust companies?

Without giving in to laborious detail in this opinion, it will suffice to say that paragraph 1 of Section 351.065 RSMo 1949 is not unlike Section 5013, Article 1, Chapter 33, RSMo 1939, which article outlined the general powers and obligations of corporations for profit organized under Missouri's corporation law; and under Sections 5013 and 5014, R.S.Mo. 1939, banks and trust companies have been obliged to pay fees required by such statutes since their enactment over fifty years ago when incorporating, or increasing their authorized stock.

The General and Business Corporation Laws of Missouri (L.1943 p. 410), at Section 351.690 RSMo 1949, treats of the applicability of such law to corporations which existed at the time the law was passed, and reads as follows:

"The provisions of this chapter shall be applicable to existing corporations as follows:

"(1) Those provisions of this law requiring report, registration statements, antitrust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required

Honorable J. A. Rouveyrol

to make such reports, registration statements and antitrust affidavits, and to pay such taxes and fees, prior to the enactment of this law;

"(2) No provisions of this law, other than those mentioned in subdivision (1), shall be applicable to banks, trust companies, insurance companies, building and loan associations, savings bank and safe deposit companies, mortgage loan companies, and nonprofit corporations;

"(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, co-operative companies for profit, credit unions, street railroads, telegraph and telephone companies, boating and rafting companies and exposition companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); and without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without par value and the amendment of articles of incorporation for such purpose shall be applicable to railroad corporations, union stations, street railroads, telegraph and telephone companies, and boating and rafting companies, and those provisions of this law mentioned in subdivision (1) will apply to all corporations mentioned in this subdivision (3).

"(4) All of the provisions of this law to the extent therein provided shall apply to all other corporations, existing under prior general laws of this state and not specifically mentioned in subdivisions (1), (2) and (3) of this section. (L.1943 p. 410 sec. 171, A.L. 1945 p. 696)."
(Underscoring supplied).

Subparagraphs (1) and (2) of Section 351.690 RSMo 1949, quoted above, lead to the conclusion that "if banks and trust companies were required, prior to 1943, to pay incorporation fees, and fees upon increase of stock, under the then existing corporation code (Secs. 5013, and 5014, RSMo 1939), they are not relieved of such obligations under the 1943 law."

Honorable J. A. Rouveyrol

Of special interest in this regard is the commentary on the General and Business Corporation Law of Missouri authored by Mr. Carson E. Cowherd, Chairman of a Committee appointed in January 1942 by the Lawyers Association of Kansas City to draft a proposed Business Corporation Code for Missouri and to sponsor its enactment into law. This commentary is found immediately preceding Chapter 351 of Vernon's Annotated Missouri Statutes, Vol. 17, Pages 299-322, and we quote from l.c. 301, 302 on this particular subject:

"APPLICABILITY OF THE ACT TO EXISTING
CORPORATIONS

"In drafting the Act an extremely difficult question arose as to how and to what extent the Act should be made applicable to existing corporations. It was first suggested that in order for an existing corporation to come under the Act it should be necessary that it elect to do so by affirmative action taken by its shareholders. Precedent for this procedure is found in Section 5031, R.S. 1939, which permitted corporations theretofore organized then in existence under any general or special laws of the state to accept the provisions of the general laws of the state relating to corporations by filing a certificate of acceptance with the Secretary of State. This suggestion concerning acceptance was not adopted except as to existing corporations for profit organized under any special law of the state (Section 351.025, R.S. 1949). The Act as passed makes existing corporations automatically subject thereto (Section 351.690, R.S. 1949) in so far as this may be done without impairing or affecting vested rights. (Section 351.695, R.S. 1949).

"This does not mean, however, that all existing corporations are fully or even partly subject to the Act. As set out in subparagraph (1) of said Section 351.690, existing corporations, foreign or domestic, required under the prior laws of the state to make and file reports, registration statements or anti-trust affidavits

Honorable J. A. Rouveyrol

or to pay fees and taxes, must continue to do so under the Act and, as stated in subparagraph (2) of this section, except as to such reports, statements, affidavits, taxes and fees, the Act shall not apply to banks, trust companies, insurance companies, building and loan associations, savings bank and safe deposit companies, mortgage loan companies and non-profit corporations, and as stated in subparagraph (3) of this section:

" 'Only the provisions of this Act which supplement the existing laws applicable to railroad corporations, union stations, cooperative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies, and exposition companies, and which are not inconsistent with or in conflict with the purposes of, or are not in derogation or limitation of such existing laws shall be applicable to the type of corporations,'

"mentioned in this subparagraph. Upon compliance with Section 351.030, R.S. 1949, any street railroad, telegraph and telephone or booming and rafting company may elect to organize under the Act, but it is not required to do so.

"In other words, the Act supplements the separate codes of various other types of corporations which are otherwise not changed or affected by the Act itself. This also is one of the principal reasons for discarding the idea that affirmative action should be required by existing corporations desiring to come under the Act."
(Underscoring supplied).

CONCLUSION

It is the opinion of this office that Section 351.065 RSMo 1949, requiring corporations to pay an incorporation fee, and an additional fee upon increase of capital stock is applicable to banks and trust companies incorporated in Missouri.

Honorable J. A. Rouveyrol

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Very truly yours,

JOHN M. DALTON
Attorney General

JLO:M:gm

BANKS:
HUSBAND AND WIFE:

Loan limit of bank to any one person set forth in Sec. 362.170 RSMo 1949 not violated by husband and wife giving their individual notes so long as note given by each does not exceed amount prescribed by said statute; and pledging of collateral owned as tenants by entirety does not make such loans a single "joint obligation."

August 23, 1955

FILED
77
Honorable J. A. Rouveyrol
Commissioner of Finance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Rouveyrol:

The following opinion is rendered in reply to your recent inquiry and, for purposes of brevity, we restate your fact situation and question in the following language:

Section 362.170 RSMo 1949 limits the amount which may be loaned by a bank to any one individual, partnership, corporation or body politic. The bank in question has a loan limit of \$36,600.00. Mr. "A" gave his personal note to the bank for \$21,000.00 with no other signature thereon than his own. At the same time the wife of Mr. "A" gave her personal note to the same bank for \$25,000.00, with no other signature thereon than her own. As security for the two notes Mr. "A" and his wife both signed one deed of trust on property which they owned as husband and wife jointly with right of survivorship. Query: Did the bank exceed its loan limit to any one individual by accepting the two notes and taking the security given?

Section 451.290 RSMo 1949 provides:

"A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being

Honorable J. A. Rouveyrol

joined as a party; provided, a married woman may invoke all exemption and homestead laws now or hereafter in force for the protection of personal and real property owned by the head of a family, except in cases where the husband has claimed such exemption and homestead rights for the protection of his own property."

In the light of language contained in Section 451.290 RSMo 1949, quoted above, it can be reasonably concluded that Mr. "A", as well as his wife, had the right to borrow on their own personal notes the amount the bank was willing to loan to each one of them. As to the deed of trust given to secure the notes, we deem the procedure to be in line with the following rule stated in A. J. Meyer & Co. v. Schulte, 189 S.W. (2d) 183, 1.c. 189:

"It is undisputed that the property in question was in the name of Mr. and Mrs. Schulte, who, being husband and wife, held the property as an estate by the entirety. It is established law that neither husband nor wife acting alone has power to subject to a lien property held as an estate by the entirety. During coverture an act to affect property so held must be joined in by both such tenants because such an estate is not held by moieties, or halves, but both tenants hold and own the entire estate as a single person."

Under the fact situation being considered it no doubt required the full value of the property pledged in order to secure the individual indebtedness of both Mr. "A," and his wife. To demonstrate that a pledge of collateral held jointly by two persons, individually obligated on their separate notes, does not make their note obligations a single "joint obligation," we cite the following from 41 Am. Jur., Pledge and Collateral Security, Sec. 99:

"The taking of collateral security for the payment of a debt does not, in the absence of a statute or stipulation to the contrary, afford any implication that the creditor is to look to it only or primarily for the payment of the debt. The obligation of the debtor to respond in his person and property is the same

Honorable J. A. Rouveyrol

as if no security had been given, and upon default in payment, the pledgee may elect to sue the pledgor for his debt, without a sale of the security, and may recover a judgment in such suit against the pledgor for the amount of the debt, without destroying or in the least affecting his lien on the property pledged."

CONCLUSION

It is the opinion of this office that a husband and wife may give their separate notes to a bank in an aggregate amount exceeding the bank's loan limit to any one person under Section 362.170 RSMo 1949, so long as the note given by each does not exceed the amount prescribed in said statute; and their pledging as collateral for such loans real estate held by them as tenants by the entirety will not make their individual obligations a single "joint obligation."

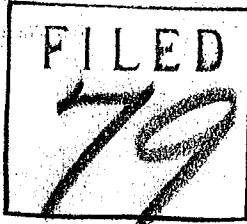
The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

STOCK LAW: Proposition to invoke stock law by entire county under
ELECTIONS: Sec. 270.090, RSMo 1949, requires merely a majority of
TOWNSHIPS: the voters voting on the proposition. Where proposition
VOTING: to enforce stock law carries at county-wide election,
the stock law is in effect county wide in spite of fact
that identical proposition submitted simultaneously at
separate township election was defeated in some of the
townships.



January 19, 1955

Honorable J. B. Schnapp
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Schnapp:

This is in response to your letter dated December 10, 1954,
which reads as follows:

"I have a copy of your opinion of November 11, 1954, addressed to the Honorable W. R. J. Hughes of Ironton, Missouri concerning Stock Law Elections under Section 270.130 RSMo 1949 wherein the opinion of your office is that if the proposition does not carry unless voted by a majority of the qualified voters of the townships who cast their vote in the General Election as distinguished by the qualified voters of such township who vote only on the proposition as submitted at such general election.

"In this County we had an election under Section 270.110 for a county wide stock law. There was over 4000 votes cast at the election, with 1846 votes being for the stock law and 970 votes against the stock law. I am wondering whether or not it takes a majority under Section 270.110 providing for a county election, of the qualified voters who cast their vote at the election, as distinguished from the majority of the voters who voted only on the proposition of the stock law.

"I do believe that there is a difference between Section 270.110 and Section 270.130 in the wording of the two statutes and it is

Honorable J. B. Schnapp

my humble opinion that it merely takes a majority of those who voted on the proposition under Section 270.110.

"Your advice and opinion on this matter will be deeply appreciated.

"There is another question which arose in connection with the same election. In several of the townships there was a separate election for the enactment of a stock law in those townships. This was held at the same time at which the county-wide election was held. In several of these townships the proposition was defeated, but carried county wide. Now, the question is, whether or not in those particular townships which defeated the stock law, is the stock law in effect because the proposition did carry on a county-wide basis. Again, my humble opinion, I believe that since the election did carry on a county-wide basis, that we do have a valid stock law for the whole county even though separate townships did reject the stock law in the township election. Again, your opinion will be appreciated on this question."

Your first question is whether a county-wide vote on the stock law under Section 270.080-110, RSMo 1949, requires a majority of those voting on the proposition or a majority of the total votes cast at the election in order to effect the adoption of the proposition.

In that connection we direct your attention first to Section 270.080, RSMo 1949, which reads as follows:

"The provisions of this chapter are hereby suspended in the several counties in this state, until a majority of the legal voters of any county voting at any general or special election called for that purpose shall decide to enforce the same in such county; provided, that only a majority of the legal voters voting on said question shall be necessary to decide its adoption or rejection."

Honorable J. B. Schnapp

Since the total of the votes cast on the proposition was 2,816 and 1,846 voted for the stock law, which is a majority of the votes cast on the question, the proposition carried in favor of enforcing the stock law.

We also direct your attention to the quotation from State ex rel. v. Wilson, 129 Mo. App. 242, 246, 108 S.W. 128, found on page 3 of the opinion of November 11, 1954, directed to Honorable W. R. J. Hughes, which is as follows:

" * * * it is evident that the Legislature intended to require more to adopt the stock law by townships than by counties, that is, it may be adopted in a county by a majority of the qualified voters who vote on the proposition, but in order to adopt it in five townships, there must be in favor of the proposition a majority of the voters voting at the election. It appears by the return to the writ of certiorari in this case that the vote on the proposition was taken at the general election held November 8, 1906, and that there were polled at such election 2,030 votes, of which 903 voted in favor of the proposition. This not being a majority of the voters voting at such election, the law was not adopted'."

(Emphasis ours.)

As we understand it, at the same time that this county-wide election was held a separate election was held in several of the townships in the county at which the same question was submitted. In several of those townships the proposition carried, but in others it was defeated. The question now is which prevails, the county-wide election or the separate elections in the various townships.

Although the statutes provide both for a county-wide election and an election in two or more townships (Sec. 270.130, RSMo 1949), we believe that the elections held in the separate townships at the same time that the county-wide election was held were superfluous under the circumstances inasmuch as the same question was presented in both elections and the proposition carried county wide. The county-wide election must be held to control every township in the county or it would not be a county election. The mere defeat of the proposition in individual townships under the county-wide election could not operate to relieve

Honorable J. B. Schnapp

those townships of the effect of the county-wide election. Nor do we see how the defeat of the same proposition submitted separately in individual townships could do so. The county-wide election must be held to be controlling and the stock law in effect county wide at this time.

If individual townships desire to permit animals to run at large in spite of the fact that the county has voted to restrain animals from running at large, such is provided for in the proviso clause of Section 270.130, RSMo 1949, which reads as follows:

"provided, however, that nothing in this section or chapter shall be construed to prevent the petitioning for and holding of an election to permit animals to run at large in any township or townships that have voted to restrain said animals from running at large, notwithstanding the county or township has theretofore voted to restrain animals from running at large."

See State ex rel. McMonigle et al. v. Spears et al., 358 Mo. 23, 213 S.W. (2d) 210.

CONCLUSION

It is the opinion of this office that a proposition to enforce the provisions of Chapter 270, RSMo 1949, the stock law, at a county-wide election is adopted by the affirmative vote of a majority of the legal voters voting on said question.

It is the further opinion of this office that when a proposition to enforce the provisions of Chapter 270, RSMo 1949, is submitted at a county-wide election and carried by a majority of the legal voters voting thereon and at the same time the identical proposition is submitted separately in township elections, the stock law is in effect county wide in spite of the fact that the proposition was defeated in individual townships.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

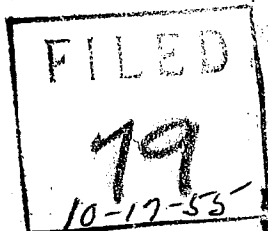
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

COUNTY COURT: Prior to October 9, 1951, there existed no legal
ASSESSOR: authority under which the county court could pay
from county funds the compensation of clerical
assistants in the office of the assessor for ser-
vices performed prior to said date.

October 17, 1955



Honorable J. B. Schnapp
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Schnapp:

Reference is made to your request for an official opinion
of this office, which request reads as follows:

"I desire an opinion on the following question,
to-wit: Mr. Buford Woods was the Assessor for
Madison County for the year 1951. The records
of Madison County, Missouri show that he was
paid the sum of \$100.00 for Clerical Assist-
ance for the year 1951. At this time, Mr. Wood
has now filed signed receipts from two individ-
uals, one in the amount of \$430.45 and the other
receipt in the amount of \$175.00, stating that
is the amount of money which he paid them for
Clerical Assistance in the year 1951. I am cog-
nizant of your opinion dated November 27, 1951.
My question is, whether or not the County Court
can now legally pay Mr. Woods for Clerical As-
sistance rendered in 1951 in view of the fact
that one payment in the sum of \$100.00 was ap-
parently previously made, and also in view of
the fact that the receipts were not filed and
the request for reimbursement for this Clerical
Assistance was not made until August, 1955."

Subsequently, we inquired of you as to the periods during
1951 when the clerical assistance to which you refer was performed.
In reply by letter dated October 7, 1955, you state that payments
were made on June 16, 1951 and July 12, 1951. Therefore, we assume
for the purpose of this opinion that said services were rendered
prior to said date.

Prior to 1951, there existed no authority for the county court
of a county of the third class to pay from county funds the compen-

Honorable J. B. Schnapp

sation of deputies or clerks employed by the assessor. This conclusion is fully developed in an opinion of this office to James D. Clemens, Prosecuting Attorney of Pike County, under date of February 4, 1950, a copy of which is enclosed herewith for your information.

In 1951, the 66th General Assembly, by the enactment of House Bill 70, authorized the assessor in counties of the third class to appoint such clerical assistants as may be necessary for the efficient performance of the duties of his office and further provided that the compensation of such assistants, in an amount not to exceed six hundred dollars, shall be paid from the county treasury. Said bill is now found as Section 53.095 RSMo Cumulative Supplement 1953, and more fully provides as follows:

"The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of such clerical or stenographic assistants shall be paid from the county treasury and shall not exceed six hundred dollars per annum in counties of class three nor six hundred dollars per annum in counties of class four."

Said bill was approved by the Governor on June 25, 1951 and became effective October 9, 1951 (by Laws of Missouri 1951).

It is a fundamental rule of statutory construction that, in the absence of clear legislative intent to the contrary, the effect of statutes is prospective only. *Clark Estate Co. v. Gentry*, 362 Mo. 80, 240 SW2d 124. Stated in other words, statutes must be held to operate prospectively only unless the intent is clearly expressed that they shall act retrospectively or the language of the statutes admits of no other construction. *Lucas v. Murphy*, 348 Mo. 1078, 156 SW2d 686. See also, *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 SW 668. In view of this rule of construction and the fact that presumably the services referred to were performed prior to the effective date of Section 53.095 RSMo Cumulative Supplement 1953, we are compelled to the conclusion that the county court would not be authorized to reimburse the county assessor for said clerical hire under the authority of said section. We are enclosing herewith an opinion of this office to Robert B. Osborn, Assistant Prosecuting Attorney, Reynolds County, under date of November 27, 1951, which also reaches the same conclusion.

Honorable J. B. Schnapp

Further, as we have hereinabove noted, there was no authority for the county court to pay the compensation of clerical hire in the office of the assessor prior to the effective date of said section.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that there is no legislative authority under which the county court of a county of the third class can pay from county funds the compensation of clerical assistants in the office of the assessor for services performed prior to October 9, 1951.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Donal D. Guffey.

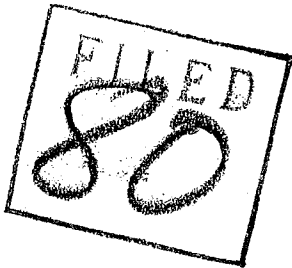
Yours very truly,

John M. Dalton
Attorney General

DDG:sm

Enc. Opinions to -
James D. Clemens, 2-4-50;
Robert B. Osborn, 11-27-51.

SOCIAL SECURITY: County court has discretion under Section
COUNTY COURT: 105.350, Vernon's Annotated Missouri Statutes,
to submit a plan for approval by the state
agency under said act.



February 23, 1955

Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads in part:

"In Stone County, a political subdivision of the State of Missouri, 4th class, is it possible for the county employees to receive the benefits from The Federal Social Security Act where all of the employees favor participation except the County Court who refuse to enter into contract with The State Social Security Agency?"

Section 105.350, Vernon's Annotated Missouri Statutes, subsection 1, provides that each political subdivision of the state may submit for approval by the state agency a plan for extending the benefits of Title 2 of the Social Security Act (42 U.S.C.A., Section 401, et seq.) to its employees and are further authorized to, by proper resolution, enter into an agreement upon its approval by the state. Said section reads in part:

"1. Each political subdivision of the state and each instrumentality of the state or of a political subdivision may submit for approval by the state agency a plan for extending the benefits of Title 2 of the Social Security Act (42 U.S.C.A. Sec. 401 et seq.), to its employees, and are hereby authorized to, by proper ordinance or resolution, enter into and ratify any such agreement upon its approval as aforesaid.

* * *

Honorable Rufe Scott

There can be no question as to the authority of any county to enter into any agreement with the state for extending such benefits to county employees. This department has heretofore rendered an opinion to this effect. Furthermore, Section 105.350, supra, clearly provides for such action.

Section 7, Article VI, Constitution of Missouri 1945, provides for the election of a county court and further provides that the county court shall manage all county business as provided by law. It is well established in this state that county courts are merely agents of the county and shall manage the county business as prescribed by law. In re City of Kinloch, 242 S.W.2d 59, 362 Mo. 434. It has further been held that outside of the management of fiscal affairs of the county, that the county courts possess no powers except those conferred by statute, Floyd v. Philpot, 266 S.W.2d 704.

Under Section 105.350, supra, it will be noted that the legislature in enacting said statute provided that any political subdivision of the state may submit a plan for approval by the state agency. The courts have held that generally in statutes the word "may" is permissive only and the word "shall" is mandatory. State ex inf. v. Wymore, 119 S.W.2d 941, 343 Mo. 98, 119 A.L.R. 710.

In view of the fact that county courts are charged by law with the responsibility of the management of county affairs and business of the county court, and that the statutes permitting the county employees to participate in such benefits provide that the county court may submit a plan for the approval of the state agency, which clearly indicates that it is within the discretion of the county court, and not mandatory, that such plan be submitted for approval, we are inclined to believe that the mere fact that all the county employees desire that such a plan be submitted for the approval of the state agency under the act is of itself not sufficient to force the county court to submit such a plan.

CONCLUSION

It is therefore the opinion of this department that in order for the employees of Stone County, Missouri to participate in any benefits under the Old Age and Survivor's Insurance Provision of the Federal Social Security Act, the County Court of Stone County,

Honorable Rufe Scott

Missouri must comply with the provisions of Section 105.350, supra, by submitting a plan for approval by the state. This is a matter entirely within the sole discretion of the county court, and the fact that all county employees desire the county court to submit such a plan is of itself insufficient to force the county court to act.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton
Attorney General

ARH:vlw/vtl

COSTS: :The change of venue fee required by Section
VENUE: :508.220, RSMo 1949, should not be returned
DEPOSIT: :to the county where the case originated,
COURTS: :upon return of the case, by stipulation of
CIRCUIT CLERK: :the parties, to the county of origin.
FEES: :.....



April 21, 1955

Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Scott:

Your letter of April 11, 1955, requesting an opinion of this office is as follows:

"Our Circuit Clerk has asked me to advise him as to the disposition he should make of the \$10. change of venue fees received in change of venue cases from other counties. And there seems to be a conflict between the Statute and the State Constitution as to such fees, I am therefore asking your good advice in the matter.

"Section 508.230 R.S. 1949, which requires such fees paid into the County Treasury, and Section 24 of Article 5, of the Constitution of Missouri, which seems to require such fees paid into the State Treasury.

"Please advise me as to what disposition the Clerk should make of such fees. Also as to whether or not such fees should be returned in the event the case is returned to the county from which it came, on stipulation of the parties to the action and before any action taken by the court?"

This office rendered an opinion on April 30, 1954, to Honorable D. W. Sherman, Jr., Prosecuting Attorney of Lafayette County, holding that such fee should be paid into the county treasury. A copy of that opinion is enclosed.

Honorable Rufe Scott:

We turn to your second question, which asks if such fee should be returned, upon return of the case to the county whence it came.

Section 508.220, RSMo 1949, provides:

"Whenever any change of venue is applied for in any civil cause from any circuit court of any county, or city constituting a county, to any other county or such city, in another circuit, the party or person applying for such a change of venue shall, with his application, deposit with the clerk of the circuit court the sum of ten dollars; and thereupon, if such change of venue is awarded, the clerk of said court shall transmit said sum of ten dollars, together with the transcript and proceedings in the cause, to the clerk of the court to which the removal is ordered; and no transcript shall be transmitted or received by any clerk on such change of venue, as aforesaid, unless said sum of ten dollars shall accompany such transcript; provided, however, that whenever any cause shall be transferred to another circuit by agreement of parties, such sum shall be paid by both parties, before any change of venue is awarded, in equal shares, and transmitted as aforesaid."

Section 508.230, RSMo 1949, provides:

"1. Said sum when received shall be paid into the county treasury in the same manner as other fees of the clerk of the court except that in any case in which a special judge presides, said ten dollar fee shall be paid to such special judge after a trial had or upon the final disposition of the cause in the court.

"2. All moneys received by the clerk of the circuit court of the city of St. Louis under and by virtue of the provisions of this and section 508.220, shall be paid by him into the city treasury, and used

Honorable Rufe Scott;

for the payment of the salaries of the circuit judges and court stenographers of said city.

"3. If no change of venue is granted, the money paid under this and section 508.220 shall be returned to the party or parties paying the same."

There is no statutory provision for return of the fee to the county where the case originated. The provisions of Sections 508.220 and 508.230, supra, indicate that the ten dollars is not in the nature of a filing fee or deposit to partially secure the costs of the case, but is instead, a flat fee which the Circuit Clerk of the receiving county is entitled to receive, on behalf of his county, upon the transmission of the case. Since the fee unconditionally accrues to the benefit of the receiving county upon transfer of the case, and there is no statutory authorization for the return of the fee upon a subsequent return of the case, by stipulation of the parties, to the county of origin, we conclude that the Circuit Clerk of the receiving county should retain the fee, and pay said fee into the county treasury of his county.

CONCLUSION

It is, therefore, the opinion of this office that the change of venue fee required by Section 508.220, RSMo 1949, should not be returned to the county where the case originated, upon return of the case, by stipulation of the parties, to the county of origin.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

Enc:

PMcG:irk

ROADS:
FOURTH CLASS, NON-
TOWNSHIP ORGANIZA-
TION COUNTIES:
SPECIAL BENEFIT
ASSESSMENT DISTRICTS:
COMMISSIONERS:
POWERS:



County Court of fourth class non-township organization county can employ county highway engineer by following procedure provided by Section 61.160 RSMo Cumulative Supplement 1953. Attempted action of county court of such class county to employ an engineer by contract and pay compensation other than that authorized by section is void. Board of Commissioners of special benefit assessment road district of non-township organization county, organized under provisions of Secs. 233.170 to 233.315 RSMo 1949, is authorized on behalf of district, to receive any funds which may be paid by Federal Government as damages to district's roads.

May 16, 1955

Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Scott:

This department is in receipt of your recent request for a legal opinion upon the two questions presented in your letter. Said request reads, in part as follows:

"Stone County is in the IV Class and we have no Highway Engineer.

"I am enclosing a contract entered into by the County Court with one L. A. Wilson, an engineer, for your examination and consideration.

"A number of public roads will be vitally effected by the lake and I understand the U. S. Corps of Engineers will either relocate and rebuild the roads or pay the County damages and thereby furnish the money for the County authorities to relocate and build the roads. From this contract I take it that the County Court intends to collect and build the roads under the supervision of this engineer under this contract. This is to be done without a legal Highway Engineer as the law provides.

"Please advise me as to whether or not the court can dispense with the County

Honorable Rufe Scott

Highway Engineer and legally contract with an engineer and pay such engineer 10% of the road and bridge money collected in such case?

"Please advise me as to whether or not the Special Road district in which about all such roads are located is entitled to the money and whether or not such roads should be located and built by the commissioners of such special road district?

* * * * *

The second question states that practically all the roads referred to are located in a special road district, and seems to indicate that some of the roads referred to are located outside the special road district. Not being advised as to the kind of special road district, we requested you to give us this information and your reply reads, in part, as follows:

"The special road district is a benefit Assessment District organized under Sections 233.170 to 233.315, the County is not under township organization."

Section 61.160, RSMo Cum. Supp. 1953, authorizes the county court of second, third and fourth class counties to appoint a highway engineer, and reads as follows:

"The county courts of such county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court. The provisions of sections 61.170 to 61.310 shall apply only to counties of classes two, three and four."

The appointment of a highway engineer in any second, third or fourth class county has been provided for by Sec-

Honorable Rufe Scott

tion 61.160, supra. It is noted that the employment of such engineer by contract has not been authorized by said section and the county court can employ an engineer only when it follows the procedure authorized by the section.

In reality it appears that the county court of Stone County (a fourth class county) has attempted to employ a professional engineer to act as county highway engineer and to pay him the compensation specified in the proposed contract. Needless to say the means thus adopted and the compensation to be paid are different from that provided by Section 61.160, supra, consequently, they are unauthorized by said section.

We enclose a copy of an opinion of this department rendered to the Honorable Roderic R. Ashby, Prosecuting Attorney of Mississippi County, Missouri, on January 18, 1949. Said opinion discusses the authority of the county court to employ someone other than the regularly appointed highway engineer to serve in that capacity, which opinion is believed to be in support of our discussion given above.

Therefore, in answer to the first inquiry of the opinion request, it is our thought that any action taken by the county court of Stone County in the employment of a county highway engineer and the proposed contract of employment, between the engineer and county are void.

The second inquiry asks if the special road district referred to is entitled to receive any funds which may be paid by the Federal Government as damages to the roads of the special district.

Section 233.190, RSMo 1949, provides what authority the commissioners of the special benefit assessment road district shall have and reads as follows:

"1. The county court shall upon the organization of such commissioners, cause all tools and machinery used for working roads belonging to the districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, for which such commissioners shall give

Honorable Rufe Scott

a receipt, and such commissioners shall keep and use such tools, and machinery for constructing and improving public roads and bridges.

"2. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon, rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work; provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as such commissioners may prescribe."

In this connection we call attention to Section 231.100, RSMo 1949, which authorizes certain officials to make settlement for damages with the proper parties when any roads, other than the State highways, have become or will become inundated by reason of the building of any hydroelectric projects. Said section reads as follows:

"Whenever the construction or operation by any person, firm, corporation or association of any power, or a hydroelectric project results in the inundation of roads other than state highways, the county court or proper officers of

Honorable Rufe Scott

the political subdivision, having jurisdiction of such roads, are hereby authorized to make settlement therefor, and all money received therefrom shall be placed to the credit of the road fund of such county or political subdivision as the case may be."

While this section specifically refers to hydroelectric projects and governs the procedure in the instances referred to, it is believed that this section is by analogy applicable to the facts referred to in the opinion request since the same principles of law are involved.

In view of the foregoing, it is believed that Section 233.190, supra, and the other sections quoted above pertaining to the power of the commissioners of the special road district, authorize the commissioners to enter into negotiations with the Federal Government for damages to the district's roads as referred to in your letter, and that the commissioners would be authorized, on behalf of the district, to receive any funds paid in settlement of damages to such roads by the Federal Government.

CONCLUSION

It is the opinion of this department that the county court of a fourth class, non-township organization county, can employ a county engineer by following the procedure provided by Section 61.160, RSMo Cumulative Supplement 1953. The attempted action of a county court of a county of this class to employ a highway engineer by means of a proposed contract to be entered into by the court and the engineer, by which a compensation other than that provided by Section 61.160, RSMo Cumulative Supplement 1953, is to be paid, is unauthorized. The action of the court as well as the proposed contract is void.

It is further the opinion of this department that the commissioners of a special benefit assessment road district of a non-township organization county, organized under provisions of Sections 233.170 to 233.315, RSMo 1949, are author-

Honorable Rufe Scott

ized under said statutory provisions, to receive, on behalf of their district, any funds which may be paid by the Federal Government as damages to the district's roads.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly

JOHN M. DALTON
Attorney General

Enc.

PNC:ma:lc

FELONIES: If it be impractical to conduct an
PRELIMINARY EXAMINATIONS: immediate preliminary examination in
CONTINUANCES: felony cases, Supreme Court Rule 23.06
provides that an "adjournment shall be
allowed either to the prosecution or to the accused for the pur-
pose of procuring the attendance of material witnesses, and for
any other good and sufficient cause."



December 1, 1955

Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This is in compliance with your request for an opinion
of this office in your letter dated November 18, 1955, which
letter is as follows:

"Please advise me as to whether or not
a magistrate may adjourn an examination
of a prisoner on application of the
prosecuting attorney on the date set
for the preliminary, it being the tenth
day after the arrest?

"Section 544.320, R. S. 1949 provides that
the examination may be adjourned from time
to time not exceeding 10 days at one time.

"In the instant case the magistrate set
the time for the preliminary ten days from
the date of the arrest and the prosecuting
attorney asked for a continuance. The
magistrate discharged the prisoner on the
grounds that he could not continue the case
except on the application of the prisoner.

"Please advise me as to this question of
law and I will appreciate your opinion as
to this statute, very much. Thanking you,
I am,"

Section 544.320 RSMo 1949, to which you refer, is as
follows:

"A magistrate may adjourn an examination
of a prisoner pending before himself,
from time to time as occasion requires,

Honorable Rufe Scott

not exceeding ten days at one time, and to the same or any different place in the county, as he deems necessary; and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by said prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner. In the meantime, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized, in a sum and with sureties to the satisfaction of the magistrate, for his appearance, before such magistrate or before any magistrate who may be authorized to hear the matter, for such further examination, and not to depart without leave of said court, and for want of such recognizance he shall be committed."

Section 5, Article V of the Missouri Constitution gives the Supreme Court the right to establish rules of practice and procedure for all courts. Said Section 5 is as follows:

"Section 5. Rules of practice and procedure--duty of supreme court--power of legislature.-- The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

Pursuant to the authority granted by Section 5, Article V of the Constitution, the Supreme Court of Missouri, on April 14, 1952, adopted Rules of Criminal Procedure for the courts of Missouri. The above rules became effective on January 1, 1953. One

Honorable Rufe Scott

of the said Rules of Criminal Procedure so adopted by the court and effective at this time is Rule 23.06, which is as follows:

"If it be impractical to conduct an immediate preliminary examination, the examination may be postponed to a later date and an examination of the accused may be adjourned from time to time as the occasion requires, not to exceed ten days at one time, and said adjournment shall be allowed either to the prosecution or to the accused for the purpose of procuring the attendance of material witnesses, and for any other good and sufficient cause. If the offense charged is bailable and the accused has not previously been admitted to bail, the accused shall be admitted to bail as provided in these Rules. Otherwise, he shall be committed by an order under the hand of the magistrate for further examination upon a future day to be named in the order."

(Emphasis ours.)

Said Rule 23.06 deals with and relates to the same subject matter which is contained in said Section 544.320. Supreme Court Rules of Criminal Procedure which became effective January 1, 1953 supersede the criminal procedure statutes which relate to the same subject matter. State v. Garrett, 282 SW2d 441, 444(5). Said Rule 23.06, therefore, supersedes said Section 544.320.

You will note that Supreme Court Rule 23.06 provides that if it be impractical to conduct an immediate preliminary examination in felony cases, an "adjournment shall be allowed either to the prosecution or to the accused for the purpose of procuring the attendance of material witnesses, and for any other good and sufficient cause."

Conclusion.

It is therefore our conclusion that if it be impractical to conduct an immediate preliminary examination in felony cases, an "adjournment shall be allowed either to the prosecution or to the accused for the purpose of procuring the attendance of material witnesses, and for any other good and sufficient cause."

Honorable Rufe Scott

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Grover C. Huston.

Yours very truly,

John M. Dalton
Attorney General

GCH:sm

ANIMALS: : Horses owned by a resident of a township which has not voted.
: to enforce the provisions of Chapter 270, RSMo 1949, to re-
STOCK LAW: : strain animals from running at large may be restrained under
: said Chapter if such animals go into a township which has
: voted to come under the stock law and break the enclosure
: of a resident of that township. Under Chapter 271 they may
: be dealt with as strays. The sheriff is a proper and auth-
: orized person to enforce the terms of said Chapter 271 when
: animals are running at large in violation of the stock law,
: under said Chapter 270, and have been deemed to be strays.

.....

January 27, 1955

Honorable William E. Seay
Prosecuting Attorney
Dent County
Salem, Missouri

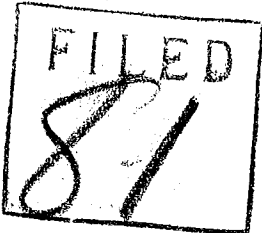
Dear Mr. Seay:

This will be the opinion you requested from this office asking in Question Number One if the provisions of Chapter 270, RSMo 1949, are applicable to animals of a resident of a township that has not elected to come under the terms of said chapter, and whether, in Question Number Two, the sheriff of the county is a proper and authorized person to enforce the provisions of Chapter 271, relating to strays, dealing with animals running at large in violation of the provisions of said Chapter 270 where the owner of such animals fails, after notice, to pay a reasonable compensation for the taking up, keeping and feeding of such animals, or, if, in Question Number Three, the sheriff is not a proper and authorized person to enforce the provisions of said Chapter 271, and the sheriff has been notified according to the terms of Section 270.010, what procedure shall be followed in order to classify and sell such animals as strays.

Your letter requesting an opinion on each of the several questions reads as follows:

"I would like to have your office's opinion with reference to the following set of facts:

"A resident of this county lives in a township which has not elected to come under the provisions of Chapter



Honorable William E. Seay:

270 1949 M.R.S. which restrains animals from running at large. This individual keeps several head of horses and three of said horses have gone into a township which restrains animals from running at large and broke the enclosure of a resident of the township where animals are restrained.

"I should like to have your opinion as to the following:

"1. Is Chapter 270 of the 1949 M.R.S. applicable to animals of a resident of a township that has not elected to come under the provisions of said chapter?

"2. Section 010 of Chapter 270 states that if an owner is notified and fails to make compensation for taking and feeding said animals or if the owner is unknown that the animals shall be dealt with in the same manner as strays and I should like to know if a sheriff is a proper and authorized person to perform the dictates of Chapter 271 1949 M.R.S.

"3. If a sheriff is not a competent person to execute the provisions of Chapter 271 1949 M.R.S. and the sheriff has been notified pursuant to the provisions of Section 010 of Chapter 270 1949 M.R.S., what procedure must be followed in order to classify and sell said animals as strays?"

Section numbers noted herein refer to RSMo 1949.

Considering your first question as to whether Chapter 270 is applicable to animals owned by a resident of a township that has not elected to come under the terms of said chapter but who permits such animals to run at large and go into a township which has elected to come under the terms of said Chapter 270, and have broken the enclosure of a resident of that township, we refer you to the opinion of this office, dated April 30, 1954, which holds:

"It appears obvious that the enforcement or suspension of the law in the place where

Honorable William E. Seay:

the cattle are actually located is controlling, and that whether the stock law is in force at the place of the residence of the owner is immaterial. This conclusion is supported by *Spitler vs. Young*, 63 Mo. 42. In that case, the owner of certain hogs resided outside of the limits of the town of Trenton. The town of Trenton had adopted an ordinance authorizing the marshall to seize and restrain any hogs found running at large in the town limits. Plaintiff's hogs had escaped from their pen outside of the town limits and were found by the marshall on the streets of Trenton. The Supreme Court made this statement as to the applicability of the ordinance of the town of Trenton to a non-resident owner, l.c. 44:

"That the plaintiff was a non-resident cannot have material effect or alter the case. It is true that the ordinance of a municipal corporation can have no extra-territorial force; but persons or property coming within the territorial limits of the corporation, come under its authority."

Considering the facts stated in your request the opinion of April 30, 1954, and the case of *Spitler vs. Young*, 63 Mo. 42, therein cited, and quoted in part, determine your first question. We therefore hold that the terms of Chapter 270 are applicable to animals which are the property of a resident of a township that has not elected to come under the provisions of said chapter, when and if such animals go into a township which has elected to adopt and has adopted the law restraining animals from running at large and have broken the enclosure of a resident of that township. Such animals may be taken up and restrained and dealt with fully under said Chapter 270.

Your second question is whether the sheriff is a proper and authorized person to enforce the provisions of Chapter 271 relating to strays under the terms of Section 270.010 respecting animals running at large in violation of the provisions of said Chapter 270

Honorable William E. Seay:

where the owner of such animals has been notified, in writing, of the taking up of animals and the amount of compensation due for their feeding and keeping and the amount of damages claimed therefor according to the terms of said Section 270.010, and if, upon such notice, the owner fails to make compensation therefor under the provisions of said chapter such animals shall be deemed strays and shall be dealt with in the same manner as required by law with respect to such property as strays, under the stray law.

Section 270.010, specifying the duties of the sheriff, as they may be required respecting animals running at large in violation of the stock law, under Chapter 270, and under Chapter 271, in case such animals are deemed to be strays to be dealt with as such under Chapter 271, including the duty respecting the provision that any person or the sheriff, on his own view, when notified by any other person that such animals are running at large, and specifying the conditions under which the sheriff is required to restrain the same and deal with them as strays, reads as follows:

"It shall be unlawful for the owner of any animal or animals of the species of horse, mule, ass, cattle, swine, sheep or goat, in this state, to permit the same to run at large outside the enclosure of the owner of such stock, and if any of the species of domestic animals aforesaid be found running at large, outside the enclosure of the owner, it shall be lawful for any person, and it is hereby made the duty of the sheriff or other officer having police powers, on his own view, or when notified by any other person that any of such stock is so running at large, to restrain the same forthwith, and such person or officer shall, within three days, give notice thereof to the owner, if known, in writing, stating therein the amount of compensation for feeding and keeping such animal or animals and damages claimed, and thereupon the owner shall pay the person, or officer, taking up such animal or animals a reasonable compensation for the taking up, keeping and feeding such animal, or animals, and shall also pay all persons damaged by

Honorable William E. Seay:

reason of such animals running at large, the actual damages sustained by him or them; provided, that said owner shall not be responsible for any accident on a public road or highway if he establishes the fact that the said animal or animals were outside the enclosure through no fault or negligence of the owner. If the owner of such stock be not known, or if notified and fails to make compensation for the taking up, feeding and keeping of animals taken up under the provisions of this chapter, the same shall be deemed strays, and shall be dealt with in the same manner as required by law with respect to such property as strays, under the stray law. Any failure or refusal on the part of such officer to discharge the duties required of him by this section shall render him liable on his bond to any person damaged by such failure or refusal, which damages may be sued for and recovered in any court of competent jurisdiction."

It clearly appears from the provisions of said Section 270.010 that the Legislature intended the sheriff to be and constituted him a proper and authorized person acting in his official capacity to perform the duties imposed upon him by Section 270.010 in carrying out the terms of Chapter 271 relating to strays. Section 270.010 is mandatory. It provides a civil penalty against such officer who, having such duties, fails to discharge the duties required of him under said section, by making such officer liable in damages on his bond to any person damaged.

We believe under the mandatory terms of this section that the sheriff is a proper and authorized person to enforce the terms of Chapter 271 where animals under Section 270.010 are so deemed to be strays, and are subject as such to all the terms of said Chapter 271. This, we believe, answers Question Number Two submitted in your request.

Honorable William E. Seay:

Having answered your second question by holding that the sheriff is a proper and authorized person to execute the terms of Chapter 271 relating to strays, as the duties imposed upon him by Section 270.010 require respecting the disposition of animals running at large in violation of the stock law, the third question submitted in your request needs no further consideration or comment.

CONCLUSION.

It is, therefore, considering the premises, the opinion of this office that:

1) The terms of Chapter 270, RSMo 1949, are applicable to animals belonging to a resident of a township that has not elected to come under the terms of said chapter, but which owner permits such animals to run at large and go into a township which has elected to come under the terms of said chapter and have broken the enclosure of a resident of that township;

2) That the terms of Section 270.010 expressly constitute the sheriff a proper and authorized person to execute the provisions of Chapter 271 relating to strays as such provisions relate to the terms of Section 270.010 which provide when and under what circumstances such animals are to be deemed strays and make such animals and the disposition of them subject to all the terms of said Chapter 271;

3) That the answer here supplied to Question Number Two renders further consideration or attention to Question Number Three, submitted in your request, unnecessary.

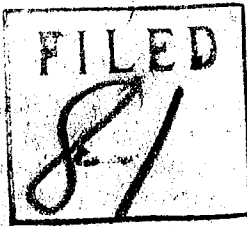
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

Indefinite

SCHOOLS: Boy committed to custody of State Board of
REFORMATORIES: Training Schools may be transferred to Algoa
STATE BOARD OF: without being physically present at Training
TRAINING SCHOOLS: School at time of transfer.



June 3, 1955

Mr. W. E. Sears
Director, State Board
of Training Schools
Capitol Building
Jefferson City, Missouri

Dear Mr. Sears:

This is in response to your request for an opinion dated April 12, 1955, which reads as follows:

"On April 2, 1952, a boy was admitted to the Training School for Boys at Boonville from St. Genevieve County on an Indeterminate Sentence. The boy's birthday being established as December 14, 1937. He was paroled from the training school April 16, 1953. On November 17, 1954, the boy received an indeterminate sentence for exhibiting a deadly weapon in a rude, angry, and threatening manner, from the Circuit Court of the City of St. Louis to run concurrently with six 7-year concurrent sentences (robbery first degree), all of which were carried by specific court orders at the time of his admittance to the school November 19, 1954.

"On February 26, 1955, this boy, in company with two other associates, overpowered and tied up a supervisor and escaped from the premise of the Training School for Boys and stole an automobile. They were apprehended shortly thereafter by the Boonville police. Due to the fact that this act was completed at the time the boy was over the age of seventeen years, he was filed upon by the Cooper County Authorities and received a sentence of two years to the Intermediate Reformatory at Algoa.

Mr. W. E. Sears

"From information we have been able to gather, this boy felt that if he would commit an offense after his seventeenth birthday, he would be prosecuted by the Cooper County Authorities and receive a lesser sentence, thereby possibly escaping from the seven year concurrent sentence imposed upon him by the Circuit Court of the City of St. Louis. We feel that a transfer to Algoa Reformatory should be effected in accordance with Section 219.230, Volume I, RSMo 1949, Page 1901, and said transfer be placed on file with the superintendent at Algoa Reformatory so the boy could complete the remaining years of his original seven year sentence as imposed upon him by the original commitment of the Circuit Court of the City of St. Louis.

"The advice and counsel of your office is respectfully solicited to determine whether or not Section 219.230, as previously indicated, would permit such procedure to the end of preventing other individuals performing like offenses after their seventeenth birthday so as to escape previous commitments of a longer period of time.

"In addition, will it be permissible if the transfer papers, as approved by official Board of Training School Action, and signed by the governor of the State of Missouri, for the boy to remain at Algoa Reformatory and to serve out the original sentence without first having been returned to the premise of the Training School for Boys at Boonville?

"It is understood that upon receipt of information from Algoa Reformatory authorities of the completion of the two year sentence, the State Board of Training Schools would again re-establish jurisdiction and payment of maintenance of the boy's stay at Algoa, together with planning for the boy's future supervision upon the individual earning such eligibility. The said retention of jurisdiction of course being based upon whether or not the Board of Training Schools may utilize Section 219.230, in the manner outlined.

Mr. W. E. Sears

"This office will be happy to furnish copies of court orders and other data concerning this boy for your study if the occasion so demands. We deeply appreciate the attention given this request for counsel."

According to the information contained in your request, the boy in question was sixteen years of age at the time when he received the six 7 year concurrent sentences on November 17, 1954. Therefore, he has been sentenced and committed to the State Board of Training Schools for a period of time which will not expire until after his twenty-first birthday (Sec. 219.160, RSMo 1949). He still has something over six years and nine months to serve on those concurrent sentences. There could be no possible basis for contention that this escape and subsequent conviction had eliminated that debt.

You have stated that the Board feels that this boy should be transferred to the Intermediate Reformatory at Alcoa, where he is now confined, so that the remainder of the above concurrent sentences can be served there. No question has been raised as to whether the 2 year sentence for car theft, committed after he had escaped from the Boonville Training School, should run consecutively or concurrently with the six 7 year concurrent sentences. Therefore, this opinion does not purport to rule on that phase of the question.

Section 219.230, RSMo 1949, provides that the Board may, for the purpose of discipline, with the approval of the Governor, transfer any person committed to its custody to any state adult correctional institution.

If the Board in the exercise of its discretion feels that for the purpose of discipline a boy should be transferred to Alcoa to serve the balance of his term, and if such transfer meets with the approval of the Governor, we do not believe that under ordinary circumstances there could be any question raised concerning such procedure because it is expressly authorized by Section 219.230, supra. The only factor in this case which creates a problem is that the boy is already in Alcoa under a subsequent sentence, and you inquire as to whether the transfer may be made without first having returned the boy to the premises of the Training School at Boonville before ordering the transfer.

We do not find any Missouri case on this question. However, in New York, under facts similar to those present here, it has been held that the boy need not be physically present in the reformatory when the transfer is made. For instance, in *People ex rel. Coppola v. Brophy*, 254 App. Div. 641, 3 N.Y.S. (2d) 491,

Mr. W. E. Sears

App. Den. 254 App. Div. 813, 5 N.Y.S. (2d) 508, Aff. 280 N.Y. 778, 21 N.E. (2d) 616, the relator had been released on parole from Elmira Reformatory. While out on parole he was convicted of another offense and sentenced to five years in the State Prison. He was taken to the State Prison and ten days later the Commissioner of Correction issued an order for the transfer of relator from the Elmira Reformatory, from which his parole had been revoked, to the State Prison. Relator still had some thirteen and one half years to serve on his original sentence to the Elmira Reformatory. Section 293 of the Correction Law of the State of New York authorized the transfer to the State Prison of "any prisoner confined in such reformatory" for various reasons stated therein. Relator petitioned for a writ of habeas corpus, which was denied. In disposing of the case the court said, N.Y.S. (2d) 1.c. 492:

" * * * While we may assume that the remainder of his original sentence should have been served in Elmira Reformatory, at least until he was legally transferred to a state prison, Correction Law, Sec. 293; Penal Law 1909, Sec. 2190, it appears that the commissioner of correction did so transfer him and we are of the opinion that the fact, that he was not physically in Elmira Reformatory at the time this order was issued, does not affect its validity. The order, on its face, was valid, and we find no ground for the relator's contention that his imprisonment in the state prison was invalid because he was not physically in Elmira Reformatory at the time of his transfer."

See also People ex rel. Rensing v. Morhaus, 53 N.Y.S. (2d) 585.

You will notice that the New York law authorized the transfer of "any prisoner confined in such reformatory." This would make a stronger case for saying that the boy must actually be confined there at the time of the transfer than the Missouri law which authorizes the transfer of "any person committed to its custody." Yet, under the New York law, it was held that he need not be present in the reformatory at the time of the transfer.

By the sentences of November 17, 1954, this boy was committed to the custody of the Board of Training Schools. Several years will remain on that commitment even after he has served his two-year sentence at Alcoa. Since the statute makes no requirement that he be physically present in the Training School when the

Mr. W. E. Sears

transfer is made, we perceive no reason why the Board cannot order him transferred to Algoa to serve out the balance of the sentences of November 17, 1954, without first having returned him to the Training School for Boys at Boonville.

CONCLUSION

It is the opinion of this office that when a boy is committed to the custody of the State Board of Training Schools for a period of time which will not expire until after his twenty-first birthday and such boy escapes from the Training School at Boonville and while at liberty commits another offense for which he is convicted and sentenced to a term in the Intermediate Reformatory at Algoa, and that after serving the later sentence time will still remain on his original commitment from the Board of Training Schools, such boy may, for the purpose of discipline, and with the approval of the Governor, be transferred by the Board of Training Schools to the Intermediate Reformatory at Algoa to serve the balance of his term of commitment to the Board without first having been returned to the premises of the Training School at Boonville.

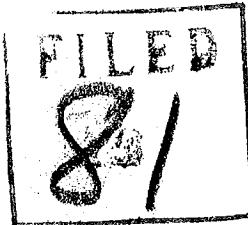
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml;sh

TRAINING SCHOOLS: Not duty of State Board of Training
STATE BD. OF TRAINING SCHOOLS: Schools to prepare and present pre-
DELINQUENT CHILDREN: sentence investigations of allegedly
delinquent children or to supervise
children found to be delinquent, unless
such children are committed to institu-
tions under control of Board.



September 21, 1955

Mr. W. E. Sears
Director, Board of Training Schools
Capitol Building
Jefferson City, Missouri

Dear Mr. Sears:

This is in response to your request for opinion dated
July 20, 1955, which reads as follows:

"The advice and counsel of your office is
respectfully solicited regarding a problem
now confronting this unit of state govern-
ment.

"Clarification is desired of Section 219.020,
RSMo Volume I, relating to powers and duties
of the State Board of Training Schools. The
point in question being whether under this
section it is the duty of said board to pre-
pare and present pre-sentence investigations;
supervise children in community living; and
perform related acts as an instrument of the
court (normally cared for by juvenile offi-
cers as employees of the county). The request
of appropriate juvenile judges being the de-
termining factor of securing services outlined
above. Children receiving this service being
primarily in two categories: 1.) Children
not being committed to the board but receiving
probationary service under court jurisdiction
and 2.) Children committed to the charge of
the board but sentence held in abeyance and
the child not received at one of the institu-
tions under the control of the Board. It is
further understood that such local service
does not relate to a child on parole or re-
leased by the board as provided for in
Section 219.250."

Mr. W. E. Sears

Chapters 211 and 219, RSMo 1949, provide a complete scheme for the handling and treatment of delinquent children. Chapter 211 is divided into three parts: That part dealing with delinquent children in counties of classes one and two (Secs. 211.010-211.300, RSMo 1949), that part dealing with delinquent children in counties of classes three and four (Secs. 211.310-211.510, RSMo 1949), and that part generally applicable to all counties (Secs. 211.520-211.540, RSMo 1949).

Juvenile courts are established for all classes of counties to have jurisdiction over cases brought to have determined the alleged delinquency of a child (Secs. 211.020 and 211.320, RSMo 1949). Provision is also made for the appointment of probation officers in counties of classes one and two (Sec. 211.200, RSMo 1949), and that in counties of class two they shall be known as juvenile officers (Sec. 211.220, RSMo 1949).

In counties of classes three and four the county court is authorized to appoint a county superintendent of public welfare who shall have all the powers and duties conferred on probation or parole officers (Sec. 205.850, RSMo 1949). If, however, the county court fails to appoint a county superintendent of public welfare, the circuit judge shall designate or appoint a county officer or some other person to serve as probation officer under the direction of the court (Sec. 211.440). However, if there is neither a county superintendent of public welfare nor a probation officer, the sheriff must investigate all cases arising under Sections 211.310-211.510, RSMo 1949, and furnish the court such information and assistance as the judge may require. If a county of class three or four has either a county superintendent of public welfare or a probation officer, the sheriff shall serve as assistant probation officer (Sec. 211.455, RSMo, Cum. Supp. 1953).

In all classes of counties it is the duty of the probation officer to make such investigation of the child as may be required by the court, to be present in court at the hearings, and to furnish to the court such information and assistance as the judge may require, "and to take charge of any child before and after trial (hearing), as may be directed by the court." (Secs. 211.200 and 211.460, RSMo 1949.)

The court has wide discretion in committing a child upon a finding of delinquency. It may commit the child to the care of some reputable person or to some association willing to receive it, to an institution, or to the care of the probation officer and allow such child to remain in its home, or other manners set out in Sections 211.110 and 211.390, RSMo 1949.

Mr. W. E. Sears

In counties of classes one and two the court may suspend sentence or execution thereof and in the meantime commit the child to the care and control of a probation officer (Sec. 211.110, RSMo 1949). In all classes of counties the court, if it deems it in the best interest of the child, may commit such child to one of the institutions under the charge and control of the State Board of Training Schools.

However, it is expressly provided that nothing in Sections 211.010-211.510, RSMo 1949, shall be construed to repeal any portion of the law relating to the Training School for Boys or the Training School for Girls, and that in all commitments to either of said institutions the law in reference to said institutions shall govern the same (Secs. 211.190 and 211.500, RSMo 1949).

Section 219.170, RSMo 1949, provides that no person shall be committed to the State Board of Training Schools whom the court finds to be in need of parental care in the family home.

Bearing in mind this last-mentioned section, since ample and adequate provision has been made for the control and supervision of delinquent children whom the court feels should not be committed to an institution under the control of the State Board of Training Schools through the appointment of probation officers or those who perform the same functions, and since the primary purpose of the Board of Training Schools is to have charge and control over the training schools and industrial homes for boys and girls of this state (Sec. 219.020, RSMo 1949), we do not believe that it is any part of the duties of the State Board of Training Schools in any event to prepare and present pre-sentence investigations or to supervise children found to be delinquent, unless in the latter case such children are committed to the Board and received by it in an institution under its control.

Once a child is committed to an institution under the control of the State Board of Training Schools, the Board may, in the exercise of its discretion, parole such child on such conditions as it sees fit, and in that event does have the duty of supervising such child until it is discharged (Sec. 219.250, RSMo 1949).

CONCLUSION

It is the opinion of this office that the State Board of Training Schools does not have any duty to prepare and present

Mr. W. E. Sears

pre-sentence investigations of allegedly delinquent children or to supervise children found to be delinquent, unless such children are committed to an institution under its control.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

SCHOOLS:
SCHOOL DISTRICTS:
DEPARTMENT OF EDUCATION:
BOARD OF EDUCATION:

An elementary pupil of a closed school district, which district was closed by the State Board of Education and required to provide for the transportation of its pupils under Section 161.120 RSMo 1949, who attends a school in another district without conferring with the Board of

Education of the home district, as to where he should attend school, is voluntarily attending such other district and the sending district does not have to pay the tuition and transportation costs of such elementary pupil when it has provided for tuition and transportation expenses to a district other than the one the pupil is attending.

FILED
81

October 20, 1955

Honorable William E. Seay
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"I would like to have your department's opinion concerning the following set of facts:

"A certain school district in Dent County had an average attendance during the school year 1954-55 of four pupils and the State Department of Education has declared the district a closed school and informed the Board that the children must be transported to another district.

"In compliance with the director from the Department, the district entered into an agreement with the directors of school district A for a payment of tuition and transportation charges for the children that attended district A.

"Without consulting with the director of the closed district, district B is transporting the children from the closed district

Honorable William E. Seay

to the school of district B. The State Department of Education informs districts of the closed district that it must pay district B tuition and transportation charges even though the tuition is much higher than at district A, with the transportation costs of A and B about equal.

"I would like to know if it is incumbent upon the closed district to pay the tuition and transportation charges of district B where there was and is no agreement with district B and where there was and is an agreement with district A."

Also, in answer to my request for further information you state that the county superintendent of schools had not done anything in this matter and had not directed School District A or B to pick up the children. You also stated that these were elementary pupils and not high school pupils and that the sending district did not notify the pupils that it had contracted with District A for transportation and tuition. You further stated that neither the pupils nor the parents inquired of the sending district as to what school they should attend but on their own had District B pick them up and they attended a District B school.

Section 161.020 RSMo 1949, reads as follows:

"If any district in this state shall have an average daily attendance of less than fifteen pupils as shown by the records of the last previous school year, the state board of education shall, in lieu of such state aid, after investigation that convinces it that it would be to the best interests of all concerned, require the board to provide for the transportation of the pupils of such district to other public school, or schools, provided that the total expense, including the transportation and tuition paid by the state, shall not exceed the amount that the state would otherwise have paid to such district."

Honorable William E. Seay

Part of Paragraph 4 of Section 165.110, RSMo Cum. Supp. 1953, having to do with school funds states:

"* * * provided, further, tuition and transportation costs shall be paid from either the teachers' or incidental funds when the school in any district has been closed on account of temporary combination or low average daily attendance, as provided by law; * * *"

Thus, reading Section 161.120 in the light of that part of Section 165.110 quoted above, it seems reasonable to construe Section 161.120 as meaning the board of education of a closed district shall provide for the transportation and tuition of its pupils to another public school or schools and that said board of education should pay for same out of its teachers' or incidental fund. This view is strengthened by the fact that the policy of the state is to furnish free education for all children of school age and the construction of any statute pertaining to such education should be liberally construed. *State ex rel. v. Clymer*, 164 Mo. App. 671. Also, since the school district board is the group which conducts the business of the school district (Section 165.207 RSMo 1949) it would seem logically to follow that they should be the ones to decide as to where the elementary children of the closed district should attend school and if an elementary pupil is to be entitled to the free transportation and tuition provided for by the board of the closed district school such elementary pupil should attend the school provided for by the board of education of the closed district. It would further follow that any elementary pupil voluntarily, attending a school other than the one provided for by the board would not be entitled to tuition and transportation expenses. Applying this construction of the law to the facts set out in your request, we find that the board of the closed district has provided for tuition and transportation for its elementary pupils by an agreement with School District A, but the pupils have elected to attend the school in School District B without consulting with the board of education of the closed district, and thus it seems they are voluntarily attending a school other than the one provided for by the board of the closed district. Thus, they are not entitled to tuition and transportation expenses to such school in School District B, and the board of the closed district is not obligated to pay the same. The fact that the board failed to notify the pupils that they had agreed with School District A for the tuition

Honorable William E. Seay

and transportation of the pupils to School District A does not change the result reached above since it is the duty of the pupil or his parent to ascertain from the board what school he should attend.

CONCLUSION

It is the opinion of this office that an elementary pupil of a closed school district, which district was closed by the State Board of Education and required to provide for the transportation of its pupils under Section 161.120 RSMo 1949, who attends a school in another district without conferring with the Board of Education of the home district as to where he should attend school, is voluntarily attending such other district and the sending district does not have to pay the tuition and transportation costs of such elementary pupil when it has provided for tuition and transportation expenses to a district other than the one the pupil is attending.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

Yours very truly,

John M. Dalton
Attorney General

HLV:ld,vlw

COMMISSIONER OF AGRICULTURE:
FAIRS AND SHOWS:

The Commissioner of Agriculture may not make cash payments to non-profit agricultural societies for the purpose of defraying the expenses of representatives of those societies to the annual convention of the Missouri Association of Fairs.



January 6, 1955

Honorable Rollo E. Singleton
Director, Livestock Division
Department of Agriculture
State of Missouri
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Pursuant to our conversation as of this date, this is to request an opinion as to whether it is possible for the Commissioner of Agriculture under Section 4.900, Page 11, House Bill #360, 67th General Assembly, to make a cash payment to otherwise qualified non-profit agricultural societies that have one or more representatives present at every session of the annual convention of the Missouri Association of Fairs."

Since writing the above opinion request, you have orally informed us that the purpose of the cash payment referred to in your letter would be to defray the travel expenses of the representatives mentioned by you to the annual convention of the Missouri Association of Fairs.

Section 4.900 of House Bill #360, 67th General Assembly, to which you refer, reads:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) for the use of the Commissioner of the Department of Agriculture for the payment to regularly organized or incorporated nonprofit agricultural societies having as their object

Honorable Rollo E. Singleton

the holding of shows or fairs for the advancement of agriculture in Missouri; to be applied on premiums paid on approved classes of agricultural stock and products by such agricultural societies as have complied with the provisions of law and the rules and regulation of the State Department of Agriculture relating to the payment by the State on said premiums; and for the necessary expenses of the Department incident to the administration of such payments, for the period beginning July 1, 1953 and ending June 30, 1955.

"For the costs of administering the program \$ 6,000.00

"For assistance to fairs. 144,000.00
\$150,000.00"

In view of Section 4.900, supra, we do not believe that the Commissioner of the Department of Agriculture would be authorized to make such payments as are contemplated by you. It will be noted that the above section states that the Commissioner of Agriculture may pay to "regularly organized or incorporated nonprofit agricultural societies having as their object the holding of shows or fairs, for the advancement of agriculture in Missouri, to be applied only on premiums paid on approved classes of agricultural stock and products by such agricultural societies * * * *"

CONCLUSION

It is the opinion of this department that the Commissioner of Agriculture may not make cash payments to nonprofit agricultural societies for the purpose of defraying the expenses of representatives of those societies to the annual convention of the Missouri Association of Fairs.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW:ld;da

CIVIL DEFENSE:
POLITICAL SUBDIVISIONS:

Official of political subdivisions authorized to sign project applications for federal contributions to Civil Defense Program is chief executive officer of political subdivision and not local civil defense director.



January 7, 1955

Mr. Marvin W. Smith
Director, Civil Defense Agency
Jefferson Building
Jefferson City, Missouri

Dear Mr. Smith:

This is in response to your request for an opinion dated December 22, 1954, which reads as follows:

"Pursuant to our general discussion with your assistant, John W. English, regarding the question as to who is eligible and qualified to sign for the local political subdivision a project application form 233, requesting participation in the Matching Funds Program (FCDA Federal Contributions Manual M25-1 Revised October 1954) for certain civil defense materials, facilities and equipment.

"A draft copy of Mo. GDA Circular 55.54 covering the appointment of Civil Defense Director, represents the logical procedure we would like to follow as it would lend itself to an effective Civil Defense organization."

In your request you refer to a proposed Mo. GDA Circular 55.54 by which it is proposed to require that project applications for matching funds from the federal government be signed on behalf of the political subdivision by the local civil defense director. Your particular question is as to whether this is proper, and if not, who the proper official is that should sign the project application.

We have examined the project application forms and the Federal Contributions Manual M25-1, Revised October, 1954.

Mr. Marvin W. Smith

Throughout the instructions contained on the project application forms and the Contributions Manual wherever the signature of an official of the political subdivision is required the official is referred to merely as the "authorized official" of the political subdivision. We must, therefore, turn to the Missouri statutes on the subject to see who that authorized official is.

Section 44.070, RSMo. Cum. Supp. 1953, the section dealing with contributions of federal aid to political subdivisions for Civil Defense purposes, reads as follows:

"Whenever the federal government or officer or agency thereof shall offer to the state, or through the state to any political subdivision thereof, services, equipment, supplies, materials or funds by way of gift, grant or loan, for the purpose of civil defense, the state acting through the governor, or the political subdivision, acting with the consent of the governor and through its executive officer, may accept such offer and upon acceptance the governor or executive officer of the political subdivision may authorize any officer of the state or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials or funds on behalf of the state or the political subdivision subject to the terms of the offer."

It is to be noted in the above section that the political subdivision through its "executive officer" may accept the offer of the federal government to contribute services, equipment, supplies, etc.

Section 44.010, Subsection (4), RSMo. Cum. Supp. 1953, reads as follows:

"(4) 'Executive officer of any political subdivision' means the county court or county supervisor of counties and the mayor or other manager of the executive affairs of any city, town, village or fire district;"

Therefore, it is our conclusion that the official authorized to sign project applications for federal contributions on behalf

Mr. Marvin W. Smith

of political subdivision, is the chief executive officer of the political subdivision. For example, in a city under the mayor-council form of government it would be the mayor, in a city under the city-manager form of government, it would be the city manager, etc. There is no authority for requiring project applications to be signed by local directors of Civil Defense. Consequently, proposed Mo. CDA Circular No. 55.54 should not issue.

CONCLUSION

It is the opinion of this office that the official authorized to sign project applications for federal contributions in the Civil Defense Program on behalf of political subdivisions is the chief executive officer of the political subdivision, and not the local director of civil defense.

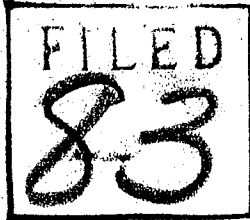
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:vlw:mw

CIVIL DEFENSE: Authorization of state to request advance
COUNTIES : of funds from federal government for cost
COUNTY BUDGET LAW: of civil defense equipment.
POLITICAL SUBDIVISIONS:



March 25, 1955

Honorable Marvin W. Smith
Director, Civil Defense Agency
Jefferson Building
Jefferson City, Missouri

Dear Mr. Smith:

This is in response to your opinion request dated February 21, 1955, which reads as follows:

"Pursuant to our telephone conversation regarding 'ADVANCE OF FUNDS' from Federal Civil Defense Administration to Missouri on approved project applications for the FCDA share of the contracts.

"Your opinion is requested as to whether Missouri (Mo.CDA) qualifies for an advance under provisions of the instructions, as outlined in the Contributions Manual, (M25-1 revised, October 1954, page 3-1, Section 3.2, Paragraph (a) sub-paragraph (1) and (2) and within the intent of Paragraph (b). Also see page 104, Section 1701.8"

The sections of the Federal Civil Defense Administration Manual, M25-1, Revised, October, 1954, to which you refer, read as follows:

Sec. 3.1. "This chapter sets forth procedures concerning (1) advances of funds by FCDA to States for items to be procured by the States, (2) reimbursement by FCDA to States for items procured by the States and (3) payment to FCDA by the States for items procured by the Federal Government."

Honorable Marvin W. Smith

Sec. 3.2. "a. Under either of the two conditions outlined below, advances of funds may be made to States to be applied to the Federal share of the cost of State-procured items:

(1) When the State law requires funds on deposit, in addition to its own, available for obligation and expenditure to cover the estimated cost of equipment; or

(2) When the State is precluded from expending State funds in excess of the State's share of the estimated cost of the equipment subject to reimbursement by the Federal Government.

"b. The Federal Civil Defense Administration, (if requested by the State, with the approval of the Regional Administrator concerned) may consider the provisions of paragraph 3.2a fulfilled and accept the certification of the State that the local law of the political subdivision concerned, adopted in accordance with the constitution and laws of the State, meets the requirement of subparagraph 3.2a (2), and it therefore may be considered to be a proper limitation on the State's authority. This does not mean that an advance will be made directly to the political subdivision. FCDA deals only with the States, and holds the State responsible for certification, payment and enforcement of the terms and conditions upon which contributions are made. Consequently, this construction of the requirements of paragraph 3.2a does not constitute an elimination of the requirements of subparagraph 3.2c. In this connection, FCDA will interpose no objection to the State Treasurer, in turn, making an advance to the political subdivision

Honorable Marvin W. Smith

concerned. This constitutes a waiver of the second clause of subparagraph 3.2c (2), and is a matter of discretion with the State Treasurer, to be arranged with the political subdivision subsequent to the waiver by this Headquarters."

Sections 1701.1-8, page 1-4 of the Contributions Manual, read substantially the same as the above-quoted sections.

The question presented has many facets and is additionally confused and complicated by reference to "State law" and "State funds" in the above-quoted sections of the Contributions Manual. Although in a very few instances the state itself may make a project application for federal contribution under the Matching Funds Program, the vast majority of the cases, if not all at the present time, involve situations where a political subdivision files a project application and pays half the cost of the project from its own funds. These funds are forwarded by the political subdivision to the State Treasurer who holds them as trustee. Neither the funds forwarded by the political subdivision nor those received from the federal government in cases of this type go into the state treasury or become in fact state funds (See opinion Attorney General directed to Arthur S. McDaniel under date of April 26, 1954, copy enclosed).

The federal government, however, does not deal directly with the political subdivision involved, but does so only through the state and holds the state responsible for all such transactions. Apparently, so far as the federal government is concerned, all funds deposited by the political subdivision with the State Treasurer for the purpose of matching funds to be contributed by the federal government are "State funds" within the meaning of the above-quoted sections of the Contributions Manual. For purposes of determining whether the state law is such that advances may be made to the state within the provisions of Section 3.2a (1), (2), the federal government has recognized this situation and has provided in Section 3.2b, supra, that the local law of the political subdivision will be accepted as "State law" within the meaning of Section 3.2a.

Therefore, it is necessary to consider separately whether there is some law applicable to the state which would entitle it to request advances of funds upon a project application of its own and whether there is some local or state law applicable to

Honorable Marvin W. Smith

each of the various political subdivisions in question which, in like token, would justify the state in doing so on their behalf.

There is no statute of this state applicable either to the state or a political subdivision expressly requiring that there must be funds on deposit, in addition to its own, available for obligation and expenditure to cover the estimated cost of equipment. As far as the state is concerned, in its own project applications it would be governed by the appropriation made to the Civil Defense Agency of Missouri. The present appropriation act, found at page 54 of Laws of Missouri, 1953, is very broad and would authorize the Civil Defense Agency to expend funds for the full purchase price of equipment under a project application and then be reimbursed under the Matching Funds Program. The Civil Defense Agency could not, however, obligate itself for an amount in excess of its appropriation for the biennium. If an expenditure for equipment in an amount in excess of its share of the cost of equipment would obligate the state beyond the Civil Defense Agency appropriation for the biennium, then it could be said that it is precluded from doing so and the state would be authorized to request an advance under Section 3.2a (2) of the Contributions Manual.

"Political subdivision" in the Civil Defense law is defined in Section 44.010(6), RSMo Cum. Supp., 1953, as follows:

"(6) 'Political subdivision' means any county or city, town, village or any fire district created by law."

Although it has been held by this office that a county is authorized to expend funds for civil defense (See opinion Attorney General directed to Forrest Smith dated January 16, 1942, copy enclosed), it has also been held many times that a county cannot exceed a budgeted item of expenditure (for example see opinion Attorney General directed to W. H. Holmes dated July 20, 1951, copy enclosed).

The ordinary and natural thing for a county court to do in preparing its budget would be to include an item sufficient to

Honorable Marvin W. Smith

cover its share of the cost of civil defense equipment as a project application. If so, it would be precluded from expending anything in excess of that budgeted amount for that purpose and would be entitled to request an advance under Section 3.2a (2), supra.

Cities, towns, villages and fire districts would have to be considered as individual cases. We cannot possibly know whether in any given city, for example, there is an ordinance or charter provision which would preclude it from expending funds in excess of its share of the cost of equipment subject to reimbursement by the federal government. If there is such a local provision or if the political subdivision does not have the available funds, then the state would be authorized to ask for an advance. As project applications are presented to your office and advance of funds requested, it will be incumbent upon your office to ascertain in each case whether such a local provision or condition exists before requesting an advance of funds.

CONCLUSION

It is the opinion of this office that the State Civil Defense Agency in its own behalf would be authorized to request an advance of funds from the federal government under Section 3.2a (2), Federal Civil Defense Administration Manual, M25-1, Revised, October, 1954, if, because of limited appropriation and lack of available funds for that purpose, it is precluded from expending more than its share of the cost of equipment under a particular project application.

It is the further opinion of this office that the State Civil Defense Agency on behalf of counties making application for federal funds would be authorized to request an advance of funds from the federal government if the county is precluded from expending more than its share of the cost of civil defense equipment because only that amount was budgeted. As to cities, towns, villages and fire districts, each case would have to be

Honorable Marvin W. Smith

considered separately and individually. If there is a local provision, e. g., ordinance, charter provision, etc., or local situation, e. g., lack of available funds, which would preclude the city, town, village or fire district from expending more than its share of the cost of civil defense equipment, then, and in that event, the state would be authorized to request an advance of federal funds under Section 3.2a (2) Federal Civil Defense Administration Manual, supra.

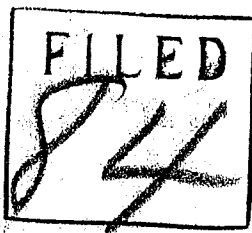
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN W. DALTON
Attorney General

JWI:ml:lc

ELECTIONS: Declaration of candidacy for the office of
SCHOOLS: county superintendent of schools filed at
COUNTY SUPERINTENDENT 11:00 A.M., on February 19, 1955, is within
OF SCHOOLS: time prescribed by Sec. 167.020, RSMo 1949.



February 28, 1955

Honorable LeRoy Snodgrass
Prosecuting Attorney
Miller County
Tuscumbia, Missouri

Dear Sir:

This is in response to your request for opinion dated February 21, 1955, which reads as follows:

"I would like to have your opinion as to the latest date and hour a person may file for the office of County Superintendent of Schools.

"The election being on the 5th of April, has a person that files for the office at 11:00 A.M., February 19th, filed within the time prescribed by section 167.020, MRS 1949? Further, if the person so filing has not filed within the prescribed time, is the proper procedure of the County Clerk to refuse to place the person's name upon the ballot?

"I would appreciate your early opinion upon this matter in that a party has so filed for the office of Superintendent on the date and at the time mentioned above."

Section 1.040, RSMo 1949, is the section that specifies the manner of computing the time within which an act is to be done. That section reads as follows:

"The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded."

Honorable LeRoy Snodgrass

The case of Butler et al. v. Board of Education of Consolidated School Dist. No. 1 of Audrain County, Mo. Sup., 16 S.W. (2d) 44, was a case involving the time within which a notice of election should be given. The statute required fifteen days' notice. In that case the court said, l.c. 45:

"The notices were posted on March 8, 1928, and the election was held March 23, 1928. Excluding the first and including the last day gives 15 days' notice of the election. Stutz v. Cameron, 254 Mo. 340, loc. cit. 363, 162 S.W. 221. The contention is overruled."

A county superintendent is required to file his declaration of candidacy at least forty-five days before the annual school meeting by virtue of Section 167.020, RSMo 1949, which section reads, in part, as follows:

"At least forty-five days before the annual school meeting in any year when a county superintendent of public schools is to be elected, any person desiring to be a candidate for election to the office of county superintendent of public schools must file with the county clerk a written declaration of his candidacy for the office, which declaration shall be filed by the county clerk and no filing fee shall be charged. * * *"

The annual school meeting is held on the first Tuesday in April of each year (Sections 165.200 and 165.330, RSMo 1949). In 1955 that day falls on the 5th of April. This candidate filed his declaration on the 19th of February. Applying the rule established by Section 1.040 and the Butler case, supra, we find that February 19th was the last day for filing and, hence, that the candidate has filed within the time prescribed by Section 167.020, supra.

It has been well established that a candidate has the whole of the last day allowed by law within which to file his declaration of candidacy. In State ex rel. Huse v. Haden, 349 Mo. 982, 163 S.W. (2d) 946, 947, the court, in quoting from an earlier case, said:

"In so holding the court said: 'It is manifest that any eligible candidate for office is entitled to the whole of the

Honorable LeRoy Snodgrass

last day allowed by law within which to
submit himself to the electors for their
suffrages. * * *"

Having answered your first question in the affirmative, i.e., that this candidate for the office of county superintendent of schools has filed his declaration of candidacy within the proper time, we deem it unnecessary to answer the second question you have submitted.

CONCLUSION

It is the opinion of this office that a declaration of candidacy for the office of county superintendent of schools filed at 11:00 A.M., on February 19, 1955, is within the time prescribed by Section 167.020, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

FEES AND SALARIES:
JUVENILE COURT:
COSTS: FEES:
PROSECUTING ATTORNEY:
DELINQUENT CHILDREN:
NEGLECTED CHILDREN:

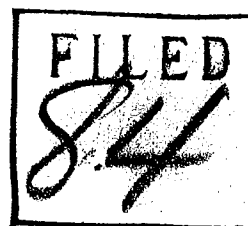
- (1) Since a juvenile court proceeding is not "of a criminal nature", a prosecuting attorney may not collect the five dollar fee allowed in Section 56.310, RSMo 1949, for "judgments upon any proceedings of a criminal nature;" but ~~that~~ he shall be allowed the five dollar fee as

provided in Section 56.310, "for his services in all actions which it is or shall be made his duty by law to prosecute or defend"

(2) Juvenile court costs according to Section 211.380, RSMo 1949, may be assessed in the court's discretion against either the "petitioner, or any person or persons summoned or appearing," or against the county.

September 7, 1955

Honorable LeRoy Snodgrass
Prosecuting Attorney
Miller County
Tuscumbia, Missouri



Dear Sir:

This is in response to your request for an opinion dated August 10, 1955, which reads as follows:

"I would like to have your opinion concerning Sections 56.310 and 211.380, MRS 1949, upon the following:

"1. Under Section 56.310, MRS 1949, Prosecuting Attorney fee section for Class three & four counties, the provision states for judgments upon any proceedings of a criminal nature, otherwise than by indictment or information, five dollars; ...

(A) In Juvenile matters under Chapter 211, MRS 1949, is the Prosecuting Attorney allowed a fee in such matters under Section 56.310, MRS 1949?

(B) If so, regardless of what grounds under that Chapter 211, MRS 1949, delinquency is found by the Court, would that fee be five dollars?

Honorable LeRoy Snodgrass

- (C) In all such juvenile matters should there be a fee of five dollars regardless of whether or not there is delinquency found by the Court because a judgment is taken or given in each case?

"2. Under Section 211.380, does the Court have discretion to assess the costs against the juvenile, parents, guardian, or petitioner as he sees fit? Does this section require the Court to assess the costs against the above named or any of them, individually or collectively, before he may require the County to pay the full costs or the balance if part of the costs have been paid?"

In regard to that part of Section 56.310, RSMo 1949, which you quote, it is clear that, for a prosecuting attorney to receive a five dollar fee for his participation in juvenile court proceedings, such proceedings must be "of a criminal nature." The attached opinion written to the Honorable Donald W. Bunker, Executive Secretary, Board of Probation and Parole, on March 5th, 1953, makes clear that a juvenile court proceeding is not a criminal judgment. See, in addition, 43 C.J.S. Section 99; State ex rel. Matacia v. Buckner, 300 Mo. 359, 254 S.W. 179; State ex rel. Shartel v. Trimble, 333 Mo. 888, 63 S.W. (2d) 37.

In summary, although no Missouri case has directly answered your question in regard to the relationship of that part of the fee statute which you quote and the juvenile court law, the best authority is that juvenile court proceedings should not be regarded as bearing the implications of a criminal judgment which would be the case if we were to say that the proceedings are "of a criminal nature." Section 56.310, RSMo 1949, provides further, however, that the prosecuting attorney shall receive a five dollar fee "for his services in all actions which it is or shall be made his duty by law to prosecute or defend...." Since the word "prosecute" in this connection means merely "to proceed against someone judicially," and since Section 211.360, RSMo 1949, requires the prosecuting attorney to participate in juvenile court proceedings, the prosecuting attorney shall receive a five dollar fee for his participation in a juvenile court proceeding which fee will then be paid to the county treasury under Section 56.340, RSMo 1949. The prosecuting attorney is allowed this fee regardless of the grounds on which delinquency is found and regardless of whether delinquency is found at all.

Honorable LeRoy Snodgrass

In answer to your second question, it is believed that the attached opinion written to the Honorable Max R. Wiley, Prosecuting Attorney, DeKalb County, on October 29, 1943, points out correctly that the court may assess the costs of a juvenile court proceeding under Section 211.380, RSMo, 1949, against "the petitioner, or any person or persons summoned or appearing," or, if the costs are not so adjudged, then the court may require the county to pay.

CONCLUSION

It is, therefore, the opinion of this office that, since a juvenile court proceeding is not "of a criminal nature", a prosecuting attorney may not collect the five dollar fee allowed in Section 56.310, RSMo 1949, for "judgments upon any proceedings of a criminal nature;" but that he shall be allowed the five dollar fee as provided in Section 56.310 "for his services in all actions which it is or shall be made his duty by law to prosecute or defend...."

It is further the opinion of this office that juvenile court costs according to Section 211.380, RSMo 1949, may be assessed in the court's discretion against either the "petitioner, or any person or persons summoned or appearing," or against the county.

Yours very truly,

John M. Dalton
Attorney General

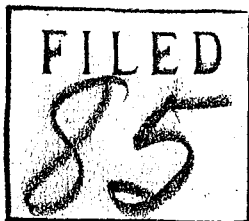
Enclosures - Donald W. Bunker
3-5-53

Max R. Wiley
10-29-43

WLaB:vlw

MAGISTRATES:
PROBATE JUDGES:

Section 481.140, RSMo 1949, relating to the power of the members of the county bar to elect a probate judge, and Section 482.120, relating to the power of a circuit judge to appoint a magistrate, in case of disability, are both rendered null and void by Section 6 of Article V of the Constitution of Missouri, and by Supreme Court Rule 11.05.



January 18, 1955

Honorable John J. Stegner
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Sir:

On January 8, 1955, you wrote to this department the following opinion request:

"This is a request from Cooper County, Missouri, for an opinion regarding the election and duties of a Special Probate Judge elected under Section 481.140 and also questions arising under the qualifications of a Magistrate and of the appointment of a Magistrate under Section 482.120.

"In Cooper County, Missouri, the Probate Judge is ex officio Magistrate. The question then arises if a person elected Probate Judge under Section 481.140 or appointed Magistrate under Section 482.120, does the constitutional and statutory provisions prohibiting elected judges from practicing law apply to the Special Magistrate or the Probate Judge? Since there are different provisions provided by the statutes for election (481.140) of the Probate Judge, and the appointment of a Magistrate (482.120) the question arises if a Special Probate Judge is elected does he become ex officio Magistrate, or if the Circuit Court appoints a Special Magistrate does he become ex officio Probate Judge?

"We would also like to know if the Circuit Court is empowered to appoint a different person as Special Magistrate from the person elected Special Probate Judge by members of the bar under Section 481.140 and vice versa?

Honorable John J. Stegner

"Due to the fact that the regular elected Probate Judge is now ill and we anticipate some difficulty in electing a Special Probate Judge due to the fact that the constitutional and statutory provisions prohibit him from practicing law, we would appreciate a reply from your office on the above question as soon as possible."

On January 10th, following, you wrote as follows:

"In addition to the questions outlined in my letter of January 8, we are confronted with an additional problem of whether an attorney who is serving as City Attorney may be elected Special Probate Judge and may be appointed Special Magistrate; in view of Article IV, Section 24, Constitution of Missouri, and Section 482.030 (L. 1945, page 765, Section 3.)"

We will here consider all of the matters set forth by you in the above two letters, in the order of their reception by us. In your request you cite Section 481.140, RSMo 1949, which reads:

"Whenever the judge of probate, from any cause, shall be unable to hold any term or part of term of court, the attorneys of the court who are present, but not less in number than five, may elect one of their members then in attendance, having the qualifications of a judge of probate, to hold the court for the occasion, or to hold the court for a part of a term."

Also Section 482.120, RSMo 1949, which reads:

"If the judge of the magistrate court in any county which has only one magistrate court is incapacitated and unable to act or to dispose of the business pending before him for any reason, or is absent from the county, for a period of five days or more, the judge of the circuit court of such county, may make an order to be entered in the records of such magistrate court, appointing and designating either some magistrate of another county within the circuit or some qualified attorney of the

Honorable John J. Stegner

county to act as judge of the magistrate court of such county until such magistrate resumes his duties, and such magistrate or special judge, when so appointed shall possess all the powers and shall be subject to all the responsibilities of the regular judge of the magistrate court during the time of his appointment. Any person so appointed shall, before acting as judge of the magistrate court, take the oath required of magistrates. Any magistrate so appointed shall be entitled to such travel and subsistence expense as may be fixed by the circuit judge which shall be paid by the state and charged against the salary of the regular judge of the magistrate court of such county. Any attorney appointed to act as magistrate shall be entitled to one-thirtieth of the monthly salary of the regular judge of the magistrate court of the county for each day he shall act as magistrate to be paid by the state and charged against the salary of the regular magistrate. Such payments shall be made upon the certification of the circuit judge and the clerk of such magistrate court that the person or magistrate was duly appointed and acted as magistrate of such court."

It is our view that both of the above sections are now void, by reason of being in conflict with Section 6 of Article V of the Constitution of Missouri, and Supreme Court Rule 11.05, promulgated under the authority of the aforesaid Section 6 of Article V of the Constitution of Missouri. Section 6 of Article V, as aforesaid, reads as follows:

"Assignment of judges - authority of supreme court. The supreme court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto."

Supreme Court Rule 11.05 reads as follows:

"Under Section 6 of Article 5 of the Constitution, the Supreme Court may temporarily

Honorable John J. Stegner

transfer to the probate court or magistrate court of any county either a circuit judge, a probate judge, a judge of a magistrate court or a probate judge who is also judge of the magistrate court of his county. When any judge is so transferred he shall have the same powers and responsibilities as judge of the court to which he is transferred and may hold court at the same time either with or separately from the regular judge or judges of said court."

In this regard we also direct attention to the case of Pogue v. Swink, 261 S. W. (2d) 40. In its opinion in that case, the Missouri Supreme Court stated at l. c. 42:

"Provisions for special judges to preside in the circuit courts arose under Sec. 29, art. VI, Mo. Const. 1875, reading: 'If there be a vacancy in the office of judge of any circuit, or if the judge be sick, absent, or from any cause unable to hold any term or part of term of court, in any county in his circuit, such term or part of term of court may be held by a judge of any other circuit; and at the request of the judge of any circuit, any term of court or part of term in his circuit may be held by the judge of any other circuit, and in all such cases, or in any case where the judge cannot preside, the General Assembly shall make such additional provision for holding court as may be found necessary.'

"The General Assembly, proceeding under said sec. 29, enacted Laws 1877, pp. 217, 218, R.S. 1879, secs. 1106-1113; now secs. 478.033, 478.037, 478.043-478.060, relating to the agreement upon or the election of an attorney of the Bar to act as special circuit judge. Sections 2, 3 and 6 of said act are now secs. 478.037, 478.043 and 478.053, respectively. We quote the material provisions of said sections.

"Section 478.037: 'Whenever * * * the judge is interested or related to, or shall have

Honorable John J. Stegner

been counsel for either party, or when the judge, if in attendance, for any reason cannot properly preside in any cause or causes pending in such court, and the parties to such cause or causes fail to agree to select one of the attorneys of the court to preside and hold court for the trial of cause or causes, the attorneys of the court who are present, but not less in number than five, may elect one of its members then in attendance having the qualifications of a circuit judge, to hold the court for the occasion.'

"Section 478.043: 'The election shall be held by the clerk of the court* * *.'

"Section 478.053: 'The parties to an action may agree upon one of the attorneys of the court to preside and to hold the court for the trial of such action * * *.'

"Section 508.100, upon which the parties rely, was Sec. 3730, R.S. 1879, and reads: 'If the judge is interested or related to either party, or shall have been of counsel in the cause, the court or judge shall award such change of venue without any application from either party, unless all the parties in the cause consent that such judge may sit on the trial thereof, or a special judge for the trial thereof be agreed upon by the parties, or elected in the manner provided by law.'

"Our Constitution of 1945 adopted a different plan with respect to this subject matter. The applicable provisions follow.

"Article V, sec. 6: 'The supreme court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto.' (Supreme Court Rule 11 was adopted pursuant to said sec. 6.)

"And art. V, sec. 15: '* * * Any circuit judge may sit in any other circuit at the request of the judge thereof.* * *'

"The Constitution of 1945 also provided, so far as material, that the Constitution of 1875 was superseded by the Constitution of 1945, Schedule, sec. 1, and that all laws inconsistent with the Constitution

Honorable John J. Stegner

of 1945 ceased to be effective on July 1, 1946, Schedule, sec. 2.

"Some cases considering secs. 6 and 15, supra, are:

"State v. Scott, 359 Mo. 631, 223 S.W.2d 453, 455 (1), held that a circuit judge transferred to another circuit under sec. 6, art. V, Mo. Const. 1945, had jurisdiction; and stated that prior criminal procedure statutes (secs. 545.670 and 545.690) providing for calling in another judge could not override the later constitutional provisions relating to the subject matter, and expressed doubt as to the validity of said sections.

"State v. Emrich, 361 Mo. 922, 237 S.W.2d 169, 172 (1), where a circuit judge had been called in under sec. 15, art. V, Mo. Const. 1945, followed State v. Scott, supra, stating: 'And we hold it (sec. 15) was self-enforcing.'

"(1) The authority of the Supreme Court to make temporary transfers of judicial personnel under sec. 6 of said Article likewise is self-enforcing."

At l.c. 44, the court stated:

"A proper procedure for defendant would have been to disqualify and request this court to transfer a judge to try the case. Consult Kansas City v. Knotts, 78 Mo. 356, 358 (1); State ex rel. Allen v. Trimble, 317 Mo. 751, 297 S.W. 378."

As we stated before, we believe, for the reasons given, that Sections 481.140 and 482.120 RSMo 1949, are no longer of any force and effect. If this be true, then all of the questions propounded by you to us are automatically resolved, since the person assigned is prohibited from practicing law. There would no longer be any question of a probate judge being elected by the members of the bar in the county in which the incapacity of a probate judge occurred, or of a circuit judge appointing a magistrate, insofar as neither of these things would be any longer done.

This situation would also, of course, preclude any possibility that the person who is now serving as your city attorney would be elected special probate judge, since we held that such elections are no longer valid.

Honorable John J. Stegner

CONCLUSION

It is the opinion of this department that Section 481.140 RSMo. 1949, relating to the power of the members of the county bar to elect a probate judge, and Section 482.120, relating to the power of a circuit judge to appoint a magistrate, in case of disability, are both rendered null and void by Section 6 of Article V of the Constitution of Missouri, and by Supreme Court Rule 11.05.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

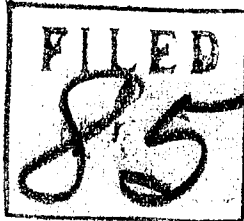
Very truly yours,

HPW/lđ

JOHN M. DALTON
Attorney General

RECOGNIZANCES: BONDS:
CONTINUANCES:

Where a criminal case is continued generally by the court the recognizance is still in effect and persons signing the recognizances may be held thereon.



April 12, 1955

Honorable John S. Stevens
Assistant Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Where a criminal case is continued generally by the Court is the bond still in effect for any purpose? Specifically can the bondsman be held thereon, and must the bondsman report that bond on his general qualifications?"

Section 544.450, RSMo 1949, reads:

"If the offense with which the prisoner is charged be bailable, and the prisoner offer sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable, on the first day of the next term thereof, and from day to day, and term to term thereafter, and to abide sentence and judgment therein, and not to depart such court without leave, and thereupon he shall be discharged."

Honorable John S. Stevens

We find no case construing this statute, presumably, because it is plain and clear upon its face that its meaning is that the continuance of a criminal case does not relieve the persons who have signed a recognizance for the appearance of the defendant.

The above Section 544.450, is the product of an amendment, made May 5th, 1931 of Section 3486, RSMo 1929. Section 3486 read as follows:

"If the offense with which the prisoner is charged be bailable, and the prisoner offer sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable, on the first day of the next term thereof, and from day to day, and term to term thereafter, and to abide sentence and judgment therein, and not to depart such court without leave, and thereupon he shall be discharged."

This section was construed in the case of State v. McCullough, 27 S.W. (2d) 1045. The court there held that a recognizance which required the defendant to appear upon a certain day and "at each and every term to which said cause may be continued," was not binding as to the aforesaid continuance because the statute made no mention of continuance. Since the amendment of the statute as noted above, this objection is, of course, removed.

In this regard we also direction attention to Supreme Court Rule 32.05, which reads as follows:

"If a person is admitted to bail after arrest upon a warrant issued upon a complaint, information or indictment charging the commission of a misdemeanor, the condition of his bond shall be that he will appear at a stipulated time, and from time to time as required by the court, to answer the charge; that he will submit himself to the orders, judgment, sentence and process of the court having jurisdiction thereof, either originally

Honorable John S. Stevens

or upon change of venue; and that he will not depart without leave.

"(b) If a person is admitted to bail for his appearance for a preliminary examination upon a complaint charging the commission of a felony, the condition of his bond shall be that he will appear for such examination at a stipulated time, and from time to time as required by the magistrate, that he will submit himself to the orders and process of the magistrate; that if he is bound over to answer the charge upon which he has been granted a preliminary examination or as to which he has waived such examination, he will appear in the court in which an indictment may be found or an information filed against him, at a stipulated time, and from time to time as required by the court, to answer the charge; that he will submit himself to the orders, judgment, sentence and process of the court having jurisdiction to try such offense, either originally or upon change of venue; and that he will not depart without leave.

"(c) If a person is admitted to bail after he has been bound over to answer a charge, or after an indictment has been found or an information filed against him, the condition of his bond shall be that he will appear in the court in which an indictment or information has been or may be found or filed against him, at a stipulated time and from time to time as required by the court, to answer the charge; that he will submit himself to the orders, judgment, sentence and process of the court having jurisdiction to try such offense, either originally or upon change of venue; and that he will not depart without leave."

CONCLUSION

It is the opinion of this department that where a criminal case is continued generally by the court that the

Honorable John S. Stevens

recognizance is still in effect and that persons signing the recognizance may be held thereon.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

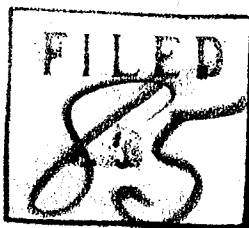
Yours very truly,

John M. Dalton
Attorney General

HPW:vlw

SCHOOLS:
TEACHERS:
CORPORAL PUNISHMENT:

A teacher has the right to inflict corporal punishment upon a pupil if such punishment is necessary to maintain order and discipline in the school; such punishment must be reasonable and proper under all of the conditions and circumstances existing; it must not be excessive, cruel, unusual, or malicious.



June 14, 1955

Honorable John S. Stevens
First Assistant
Prosecuting Attorney
St. Louis County Court House
Clayton 5, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"Since the first of this year we have had several complaints about corporal punishment being administered to school children in this County.

"We would appreciate your opinion as to the legal test to determine when a criminal charge should be filed against school authorities for administering corporal punishment."

In the case of State v. Boyer, 70 Mo. Appeals, 156, at l.c. 159, the court in its opinion stated:

" * * * The court in a great number of instructions told the jury in effect that a school teacher has the right to inflict a reasonable corporal punishment upon a pupil for a violation of any reasonable rule of his school, but that he has no right to inflict unreasonable and excessive corporal punishment, or with malice. This was undoubtedly the law. Bishop on Crim. Law, sec. 886; Dritt v. Snodgrass, 66 Mo. 286. * * * "

In the case of State ex rel. v. Randall, 79 Mo. App. 226, at l.c. 230, the court stated:

Honorable John S. Stevens

" * * * The teacher of a school as to the children of his school, while under his care, occupies for the time being the position of parent or guardian, and it is his right and duty not only to enforce discipline to preserve order and to teach, but also to look after the morals, the health and the safety of his pupils; to do and require his pupils to do whatever is reasonably necessary to preserve and conserve all these interests, when not in conflict with the primary purposes of the school or opposed to law or a rule of the school board. Neither the law nor a rule of the school board was transgressed by the teacher in this instance; the order or request to Warren Beaty was reasonable, not unlawful, and he should have obeyed it.
* * * "

In the case of Haycraft v. Grigsby, 88 Mo. App. 354, at l.c. 359, the court stated:

" * * * The law in regard to a teacher's right to punish a pupil is well settled in this State. The teacher has a right to inflict reasonable punishment for misconduct by whipping, but has no right to inflict unreasonable and excessive corporal punishment in that mode or any other. Nor can punishment in any degree be inflicted maliciously, namely, without just provocation. There is no such thing as reasonable punishment from a malicious motive. It must be administered for a salutary purpose--to maintain the discipline and efficiency of the school. State v. Boyer, 70 Mo. App. 156; State ex rel. v. Randall, 79 Mo. App. 226; Drittt v. Snodgrass, 66 Mo. 286. * * * "

Honorable John S. Stevens

In the case of Christman v. Hickman, 37 S.W. 2(d) 672, at l.c. 674, the court stated:

"5. Complaint is made of plaintiff's instructions 1, 2, and 4. Instruction 1 told the jury that, although teachers in public schools have a right under the law to inflict reasonable punishment upon the pupils, nevertheless a teacher has no right to inflict unreasonable or excessive punishment upon the pupils, and, if the jury found that the defendant did inflict unreasonable and excessive punishment upon the plaintiff, then they will find the issues in favor of the plaintiff. This instruction, by its terms, covers the whole case, and authorizes a verdict in plaintiff's behalf if the jury found defendant did inflict unreasonable or excessive punishment. The only criticism leveled against this instruction by defendant is that it furnishes no guide for the jury in arriving at a verdict, that the terms 'unreasonable' and 'excessive' are not defined, and that the instruction is confusing and misleading. Defendant has not cited any authority to support her contentions. The failure to define the words 'unreasonable' and 'excessive' is not reversible error. Holmes v. Protected Home Circle, 199 Mo. App. 528, 535, 204 S.W. 202; Miller v. Firemen's Insurance Co., 206 Mo. App. 475, 493, 229 S.W. 261; B. F. Goodrich Rubber Co. v. Newman (Mo.App.) 271 S. W. 1029. * * * "

From the above it will be seen that the holding of the cases is that a teacher is charged with the duty and responsibility of maintaining discipline and order in her school; that if to do this it is necessary to

Honorable John S. Stevens

inflict corporal punishment upon a pupil, the teacher may do so, but that the punishment must be reasonable and proper under the circumstances, not cruel, unusual, excessive, or malicious. In other words, every case must be judged in the light of reason upon its own set of facts.

CONCLUSION

It is the opinion of this department that a teacher has the right to inflict corporal punishment upon a pupil if such punishment is necessary to maintain order and discipline in the school, but that such punishment must be reasonable and proper under all of the conditions and circumstances existing, that it must not be excessive, cruel, unusual, or malicious.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:gm

INHERITANCE TAXES:
APPRAISER'S HEARINGS:
PROSECUTING ATTORNEY'S
ATTENDANCE:

Prosecuting Attorneys of each county of the State are required, under provisions of Section 145.270, RSMo 1949, to attend all inheritance tax appraiser's hearings held in his county.



July 6, 1955

Honorable John S. Stevens
Assistant Prosecuting Attorney
St. Louis County
Clayton 5, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion which reads as follows:

"Is the Prosecuting Attorney of St. Louis County required to attend all Appraiser's Hearings referred to in Paragraph 4 Sec. 145.150 Missouri Revised Statutes, 1949?"

The first inheritance tax law in Missouri was enacted in 1899, and was included in Chapter 1, Article XVI, of the 1899 Revised Statutes of Missouri, under the title "Collateral Inheritance Tax." Under Section 316 of this article the probate court was given jurisdiction to hear and determine all questions arising as to the tax that might arise affecting any devise, legacy or inheritance under that article, and under the same section the prosecuting attorney of the proper county was to represent the interest of the State in any such proceedings.

Under Section 312 of this article the Judge of the Probate Court having jurisdiction of the estate of the decedent was to appoint an appraiser to have an appraisal of the property subject to the inheritance tax, and such appraiser was to conduct an appraisal hearing and was given the power to subpoena witnesses, take evidence, under oath, and take depositions. Notice was to be given to all persons interested in the property appraised as to the time and place of appraisal. After such hearing or proceeding by the appraiser under Section 313, the appraiser was to make a written report of his findings to the Judge of the Probate Court and the judge would then assess the tax on the property and, from this assessment, an appeal was provided for to the probate court and notice of this appeal was to be given to all persons known to be interested therein.

Honorable John S. Stevens

The inheritance tax law remained unchanged until it was amended and altered by the Laws of 1917, page 114, when it was reenacted into what is now its present substance and form except for minor changes and additions. The appointment of an appraiser, his duties, and the holding of an appraisal hearing under the 1917 laws was substantially the same as that under the present law which is found in Sections 145.150 and 145.160, RSMo 1949; these two sections presently reading: Section 145.150

"1. The probate court which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, shall have jurisdiction to determine the amount of the tax provided for in this chapter and the person, persons, association, institution or corporation liable therefor, and to determine any question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction.

"2. Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this law, such finding and opinion shall be entered of record in said court, and thereupon the provisions of section 145.210 shall become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon application of interested parties the existence of other property or an erroneous appraisement be shown.

"3. If it appear that said estate may be subject to such tax, it shall be the duty of the court to set a day for the hearing

Honorable John S. Stevens

and determining the amount of said tax and to cause notice thereof to be given in the same time and manner and to the same parties as is herein provided for appraisers, or the court, before determining such matters, may of its own motion, or on the application of any interested person, including the director of revenue, the prosecuting attorney or attorney general, appoint some qualified tax-paying citizen of the county, who is not executor, administrator or beneficially interested in said estate or the attorney for any of such parties, as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under the provisions of this chapter.

"4. Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as such appraiser and that he will appraise all the property, estate, interest therein or income therefrom involved in the proceeding in which he is appointed at its clear market value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date so fixed and shall also give notice by mail to all interested persons whose address he may have, always including the director of revenue and the prosecuting attorney of the county."

Section 145.160

"1. The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and

Honorable John S. Stevens

the production of books, records, documents, papers and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath.

"2. He shall make report of his appraisal to the court in writing and shall return the testimony of the witnesses and all other evidence and such other facts in relation thereto as the court may by its order require, and such report shall be made within twenty days after the appointment of such appraiser, unless the court, for good and sufficient cause, by order gives such appraiser further time in which to report; provided, when the estate consists of personal property only, the prosecuting attorney may, with the consent of the director of revenue agree with the parties liable to pay any tax upon the amount of the same, and the court, if it approves such agreement, shall enter judgment accordingly and no appraiser shall be appointed."

Under the 1917 law and the law today, as found in these two sections, there is no specific mention of any duties of the prosecuting attorney as concerned with an appraisal hearing, but under Section 145.150 notice of time and place of the hearing is to be given to the prosecuting attorney by the appraiser and, under Section 145.270, RSMo 1949, and under Section 18 of the Laws of 1917, page 122, it is provided that the prosecuting attorney shall represent the State at all hearings, proceedings and trials under the provisions of the inheritance tax law in the probate and circuit courts.

It is inconceivable that the Legislature would have provided for notice of the appraisal hearing for any other reason than that the prosecuting attorney should attend the hearing; for if this were not so there would be no reason for notice to the prosecuting attorney. The Legislature, when it enacted Section 18 of the Laws of 1917 and enacted it again in 1949 in Section 145.270, must have, by its wording, intended that the prosecuting attorney attend the appraisal hearing. This conclusion is aided by the fact that in

Honorable John S. Stevens

all other sections of the inheritance tax law wherein the prosecuting attorney has duties to perform, it is specifically enumerated what duties there shall be. This can be shown by reviewing these sections. Section 145.170, RSMo 1949, authorized him to file exceptions to the appraiser's report, and also to take an appeal from the court's judgment fixing the amount for the liability of the tax. Section 145.280, RSMo 1949, requires the prosecuting attorney to institute suit for any past due tax.

Section 145.300, RSMo 1949, requires the prosecuting attorney to bring suit for the recovery of any tax omitted by the court in which the administrative proceedings were had; thus it will be clearly seen that the Legislature must have intended something by the use of Section 145.270, since it would not have any bearing on these three previously mentioned sections, other than to reaffirm the duties of the prosecuting attorney required therein. But these three sections only relate to trials and suits for taxes, while the Legislature specifically stated in Section 145.270 that the prosecuting attorney was to represent the State, not only at all trials under the provisions of the inheritance tax law, but to represent the State also at all hearings and all proceedings. The duty of the prosecuting attorney at such appraisal hearing is to see that the State's interest as to the taxation of the property of the decedent is fully protected and to make certain that said appraisal is not fixed at a too low value.

CONCLUSION

Therefore, it is the opinion of this department that the prosecuting attorney or an assistant prosecuting attorney of each county of the state is required, under the provisions of Section 145.270, RSMo 1949, to attend every and all inheritance tax appraisers' hearings held under Section 145.150, RSMo 1949, in his county.

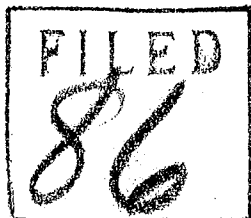
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Harold L. Volkmer.

Very truly yours,

John M. Dalton
Attorney General

HLV:loj:sm

LIQUEFIED PETROLEUM GAS-- : Neither Section 2 of Senate Bill No.
: 179, 64th General Assembly nor Basic
Drums -- Transportation--: Rule B.15 respecting the handling
Installation. : of liquefied petroleum gas prohibit
: the transportation of such drums,
: either empty or containing gas, on
: the highways of this State.
.....



February 3, 1955

Honorable Lyndon Sturgis
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Mr. Sturgis:

This is the opinion of this office complying with your recent request for an opinion whether certain practices followed by individuals and others in the handling, transportation and installation of steel drums containing liquefied petroleum gas, or such drums when empty on the highways of this State and on the property of dealers in and users of such product, comply with the terms of Section 2 of Senate Bill No. 179, 64th General Assembly and with Basic Rule B.15 of the Rules and Regulations promulgated thereunder by the State Inspector of Oils. Your request reads as follows:

"The Secretary of the Missouri L-P Gas Association has asked me to write you for an opinion on a matter pertaining to such Association prior to the time that I take office. It is my understanding that such practice is proper in unusual cases.

"The matter on which an opinion is requested concerns the interpretation of Sec. 2 of Senate Bill No. 179, 64th General Assembly and Basic Rule B.15 of the Rules and Regulations promulgated thereunder by the State Inspector of Oils.

"The factual situation, which is thought to be in violation thereof, is set forth in the letter of D. M. Orcutt, Secretary

Honorable Lyndon Sturgis:

of the Association, dated December 11, 1954, which letter I enclose.

"You will note the statement in such letter, that the Association hopes that your office can give an opinion on this matter by January 19, 1955. I am sure this request will receive your careful and prompt attention."

The State Inspector of Oils of the Motor Vehicle Fuel Tax Unit of the Department of Revenue has, upon our request, supplied this office with a copy of such Rules and Regulations in booklet form.

With your request there is transmitted for our consideration the letter dated December 11, 1954, noted in the request, stating a hypothetical case of practices by an individual in the transportation, installation and use of such gas drums, either empty or containing such gas, in Greene County, involving the use of the public highways, the work and physical action of individuals or others in the installation of equipment necessary thereunder, and the use thereof by individuals.

That part of the letter referred to, describing practices supposedly indulged in by an individual in the handling, transportation and installation of such liquefied petroleum gas and gas drums, but which do actually happen at times, and which apparently prompted the request for this opinion, reads as follows:

"To be more specific a parallel case might occur in this manner: I am a user of so-called bottle-gas at my residence located on Rural Route 3. The equipment I use has been loaned to me by the dealer supplying our gas. This equipment consists of two 100# steel drums of an approved type. Common practice has been for my supplier to deliver a newly charged drum, when the supply is depleted. However, my supply happens to be depleted prior to my supplier's customary trip to my residence. I simply load the uncharged drum in the tonneau of my private automobile, perhaps uncapped and take it to

Honorable Lyndon Sturgis:

my supplier for a re-charging. The route I take might happen to be through the local fire-zone, or whatever is necessary to get to my destination. My supplier will either re-charge the drum brought to him, or give me a fully charged drum of L-P Gas, load it into my private automobile and send me on my way. After arriving at my residence, I must unload this drum (now 200#) hook it to the gas line, and trust that everything is in satisfactory order."

Section 2 of Senate Bill No. 179, enacted by the 64th General Assembly (Laws of Missouri, 1947, Vol. II, Page 252), is now Subsection 1 of Section 323.020, RSMo 1949. That part of said Subsection 1 of said Section 323.020 providing for the promulgation and enforcement of reasonable rules and regulations by the Department of Revenue, respecting the handling and transportation on the public highways and elsewhere of such liquefied petroleum gas, reads as follows:

"1. The appropriate officer in charge of the collection and inspection of motor vehicle fuels in the department of revenue shall make, promulgate and enforce regulations setting forth minimum general standards covering the design, construction, location, installation and operation of equipment for storing, handling, transporting by tank truck, tank trailer, and utilizing liquefied petroleum gases and specifying the odorization of said gases and the degree thereof. Said regulations shall be such as are reasonably necessary for the protection of the health, welfare and safety of the public and persons using such materials, and shall be in substantial conformity with the generally accepted standards of safety concerning the same subject matter. Such regulation shall be adopted by the appropriate officer in charge of the collection and inspection of motor vehicle fuels in the department of revenue only after a public hearing thereon."

Honorable Lyndon Sturgis:

Basic Rule B.15 of such Rules and Regulations noted in the request relating to "Instructions" is found at page 18 of the said booklet, and reads as follows:

"B.15. Instructions.

"Personnel performing installation, operation and maintenance work must be properly trained in such function."

We have given extended study to Section 2 of said Senate Bill No. 179, the Rules and Regulations promulgated thereunder by the State Inspector of Oils, and the letter of the Missouri L-P Gas Association questioning whether certain acts of individuals in the handling of such gas and the equipment commonly used in the utilization thereof violate said Section 2 and Basic Rule B.15 of such Rules and Regulations or both of them. The first question to be answered is, as we read and understand the factual background of the request, supposedly existing, whether it is in violation of said statute or said rules for a private individual to transport gas drums, either filled or empty, on the highways of this State.

We do not believe such acts, if they are indulged in, constitute a violation of either the said statute or said Basic Rule B.15.

The purpose and intent of the Legislature in enacting said Section 2 of said Senate Bill, now Subsection 1 of said Section 323.020, was to provide and delegate authority to the Inspector of Oils, to prepare and make effective rules and regulations for the safe handling of petroleum liquefied gas. When that statute was complied with by the Inspector of Oils by preparing and issuing such rules and regulations, as was accomplished by him, there was nothing else for the statute to require to be done. The section itself then could not be and is not violated by any of the acts said to be indulged in by private individuals or others in the transportation, handling or installation of equipment used in the liquefied petroleum gas business. That leaves Basic Rule B.15 only to be considered. We do not believe Basic Rule B.15 is violated by the acts of an individual in the handling, transportation or installation of either filled or empty gas drums. We have observed that Basic Rule B.15 requires that: "Personnel

Honorable Lyndon Sturgis:

performing installation, operation and maintenance work must be properly trained in such function." There is no reference in said Rule to the "transportation" of either the empty drums or drums containing such gas. We do not believe the word "installation" as used in said Rule B.15 can be enlarged so as to include the "transportation" of such drums, either empty or filled, with such gas. The words "transportation" and "installation" each when standing alone or translated into an activity or condition have no kindred meaning or synonymous relationship one with the other. We do not believe, therefore, that Basic Rule B.15 may be construed to refer to or cover, in the construction and meaning of the rule, the act of transporting such gas or such gas drums on the highways of this State under the term "installation" contained in said rule.

Considering the term "installation" as used in said Basic Rule B.15 it is provided that "personnel" performing such installation must be properly trained in such activity. "Personnel", according to Webster, means a body of persons who are employed to render service as a group, or as a collective number of attendants upon some undertaking. In this case it would apparently mean the employees of a dealer in such gas. We believe Rule 2.10, page 29, of the compiled brochure of said Rules and Regulations supports this position on the question of instructions to or training of the individual user of such gas, as to installations. That rule states:

"For installations which require operation of equipment by the user, instructions shall be furnished to the personnel responsible for the operation of the system."

We believe that under this rule, when the dealer or his employees have knowledge of how to advise the user and instruct the user of such gas drums how to install them by connecting them with other equipment, this would constitute proper training to such personnel employed by the dealer and to the individual user of the equipment by the personnel of the dealer and would comply with said Basic Rule B.15 and would not be a violation of the term "installation" in such rule by the user or the dealer in acting accordingly, and would not be giving the word a broader meaning than was intended by the rule when read and applied along with said Rule 2.10, supra.

Honorable Lyndon Sturgis:

CONCLUSION.

Considering the premises, it is the opinion of this office that:

1) A private individual user of liquefied petroleum gas may transport over the highways of Missouri empty liquefied petroleum gas drums or such drums containing such gas without violating either Section 2 of Senate Bill No. 179, 64th General Assembly, or Basic Rule B.15 of the Rules and Regulations promulgated under said Section 2 by the Inspector of Oils of this State;

2) An individual user of liquefied petroleum gas does not violate the terms of Section 2 of Senate Bill No. 179, 64th General Assembly of Missouri or Basic Rule B.15 of the Rules and Regulations promulgated thereunder by the Inspector of Oils of this State in installing in his own home a drum containing such gas if such individual has been instructed by a dealer, or the employees of such dealer, supplying such gas to him, how to install such drum and connect it to other pipes and equipment in the operation of such equipment in the use of such gas.

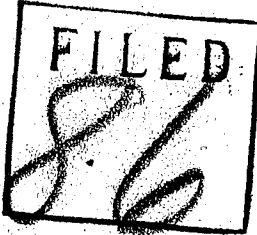
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

GWC:irk

COUNTY COLLECTORS: Limitation on amount of commission of ex officio collectors in township organization counties in Section 52.270, RSMo 1949, not unconstitutional.



September 8, 1955

Honorable Christian F. Stipp
Member, House of Representatives
Carrollton, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request, condensed somewhat for purposes of brevity, reads as follows:

"I respectfully request your opinion concerning the liability of a County Treasurer and Ex-Officio Collector, under the following circumstances, for alleged excess commissions retained by him for the collection of taxes.

"In 1954 and 1955, the County Treasurer and Ex-Officio Collector in a county operating under the township organization form of government made his final settlement with the county court and fully reported all the taxes chargeable against and collected by him for the year 1953 and 1954, respectively. This settlement shows that he retained fees and commissions in excess of the amount set out in Section 52.270, R.S. Mo. 1949. He also made settlement with the State of Missouri for the year 1953. He submitted his accounts and vouchers for the year 1954 to the State of Missouri and settlement has not been made with the state.

"The State of Missouri now seeks recovery from said County Treasurer and Ex-Officio Collector for its share of such alleged excess commissions

Honorable Christian F. Stipp

"There is no basis for a charge of fraud, collusion or mistake of fact in the settlements.

"Question No. 1. Can the County Treasurer and Ex-Officio Collector now be required to pay to the county a sum equal to the county's share of the amount of commissions and fees retained by him in excess of the amount set out in Section 52.270, R.S. Mo. 1949?

"Question No. 2. Can the County Treasurer and Ex-Officio Collector now be required to pay to the State of Missouri a sum equal to the State's share of the amount of commissions and fees retained by him in excess of the amount set out in Section 52.270, R.S. Mo. 1949?"

Inasmuch as this matter concerns accounts between the county treasurer and ex officio collector and the state collector of revenue, we have taken the liberty of discussing with Mr. Croy of the County Department of the Office of Collector of Revenue the circumstances surrounding the allowance of the excess commissions to the treasurer involved. We are advised that prior to the increase in compensation of the county treasurer and ex officio collector in township organization counties made by an amendment of Section 54.320, Laws of Missouri, 1951, page 377, which became effective for the term of such officials beginning March 1, 1953, there had been no question of the commissions of the ex officio collectors in counties under township organization exceeding the limitation fixed by Section 52.270, RSMo 1949. With the increase in commissions and the increased public utility taxes collected by such officials, the commissions claimed by the ex officio collectors in five counties for taxes collected during the year 1953 exceeded the maximum allowed under Section 52.270. In examining the settlements of these ex officio collectors, the state collector of revenue overlooked the fact that the limits of Section 52.270 were applicable. On June 28, 1954, Mr. Croy wrote the collector of the county with which you are concerned as follows:

"A check of your annual settlement on state taxes and licenses for the year ending February 28, 1954, has been made and it is found to conform to the reports and records

Honorable Christian F. Stipp

filed in this department, with all amounts due the state, as ascertained on said settlement, being paid into the state treasury."

Sometime later, the attention of the Department of Revenue was called to the fact that Section 52.270 by its terms limited the amount of commission which the county treasurer and ex officio collector in township counties was entitled to retain. On February 11, 1955, the Director of Revenue requested an opinion of this office on the question of whether or not the limitations contained in that section were applicable to such officials. This office, on March 2, 1955, rendered an opinion holding that such limitations were applicable. Shortly thereafter, on March 29, 1955, Mr. Croy called at the office of the county treasurer and ex officio collector of the county with which you are concerned. The treasurer was absent at the time, but Mr. Croy did advise the deputy in the office of the fact that the treasurer's commissions were subject to the limitations contained in Section 52.270. Apparently this information was conveyed to the treasurer, inasmuch as you subsequently called Mr. Croy in his behalf, inquiring regarding the matter. All of the foregoing transpired before the collector's settlement for the year 1954 had been filed with and approved by the county court on May 9, 1955.

Despite the advice of the representative of the office of collector of revenue to the treasurer that the limitations of Section 52.270 were applicable, that official took credit on his 1954 settlement for all commissions received by him without limitation. His theory in doing so is not known. He did indicate to Mr. Croy that he had been advised that Section 52.270 was unconstitutional as applied to him because in its enactment the bill related to more than one subject. However, whether the collector acted on that basis is not known to us. Furthermore, we have no knowledge of what transpired between the treasurer and the county court when the settlement was presented to them. We do not know whether or not the treasurer advised the county court of the fact that he had been informed that his commissions were subject to the limitations contained in Section 52.270, and, if so, what reason, if any, the county court assigned for ignoring provisions of that section.

A copy of the settlement was submitted to the collector of revenue on May 11, 1955, and he refused to approve it, demanding that the treasurer remit to the state the excess commissions retained by him. To date, the treasurer has refused to remit such excess commissions charged by him against the state. We might note that the ex officio collectors of two other counties similarly situated remitted the excess commissions to the state for both 1953 and 1954 upon request of the collector of revenue.

Honorable Christian F. Stipp

The Supreme Court of this state has had occasion to consider the effect of the approval of a collector's settlement by the county court on the right of the county and state to regain excess fees retained by the collector and shown on the face of his settlement. In the case of State ex rel. Scotland Co. v. Ewing, 116 Mo. 129, 1.e. 137, the court said:

"County courts are, by statute, given full power and authority to make the final settlement with the collectors of their respective counties, which includes the allowance of their commissions, and, after the amount found due on such settlement has been paid to the treasurer, the clerk of such court is empowered to give a discharge and 'full quietus' under the seal of the court. Now while these settlements do not have the conclusiveness of judgments, no reason can be seen why they should not be given the force of settlements between private persons. The 'full quietus' to which the collector is entitled implies that some verity should be given to the settlements. * * *

"In the case at bar the facts were all before the court and as to them no question seems to have been raised. The error was in the decision of the court as to the amount of the collector's commission. The settlement was approved, the excessive commission allowed, and a full quietus given. No attempt was made on the trial to show fraud or mistake of fact in making or approving the settlement. Indeed defendants offered to take the burden of proving that the amount of commission was fully discussed and that the amount agreed upon was believed to be what was due under the statute.

* * * * *

"No fraud, collusion, or mistake of fact, having been shown, we think the circuit court correctly held the settlement binding on the county and its judgment is affirmed.
* * *"

This holding was followed in the case of State ex rel. Lawrence County v. Shipman, 125 Mo. 436, 28 S.W. 842. The most

Honorable Christian F. Stipp

recent exposition of this rule which we find was in the case of State ex rel. Thompson v. Sanderson, 336 Mo. 114, 77 S. W. (2d) 94, decided by the Supreme Court in 1934.

However, this doctrine has not been wholly unquestioned. In the case of Lamar Township v. City of Lamar, 261 Mo. 171, the court discussed the question of the effect of payment by a public official of public funds under mistake of law. In that case the court stated, 261 Mo. 1. c. 186:

"The serious question and the one as to which appellant most earnestly and strenuously contends, is whether the rule that money paid without protest or duress, under a mistake of law, cannot be recovered, applies as between officers of municipal corporations dealing with the money and the property of the public. That individuals may not recover money so paid, absent fraud, protest or duress, is too well settled for argument. * * *

"Certainly in a case like this of dealings between public officers with the public's money, no excuse for invoking this rule can be found in logic, nor in our opinion can such excuse be found in the decided cases. The rule in such case is thus stated in 30 Cyc. 1315: 'Although there are cases holding the contrary, the better rule seems to be that payments by a public officer by mistake of law, especially when made to another officer, may be recovered back.' * * *"

The court further stated, 261 Mo. 1. c. 189:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their

Honorable Christian F. Stipp

hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

In that case the court discussed the above-cited cases, stating, 261 Mo. 1. c. 190:

"The other cases of Scott Co. v. Leftwich, 145 Mo. 1. c. 34; State ex rel. v. Shipman, 125 Mo. 436; State ex rel. v. Ewing, 116 Mo. 129; and State ex rel. v. Hawkins, 169 Mo. 615, were all cases of settlements made by the county with county officers, i.e., circuit clerks, and county collectors. Formal settlements intervened, which settlements were set down upon the solemn records of a court of record. The shadowy reason behind the holdings in these cases smacked of the doctrine of res adjudicata, and accord and satisfaction. * * *"

We feel that the court in the Lamar case pointed out the essential basis of the decisions in the Shipman and Ewing cases, i.e., res judicata. The settlements there involved had been approved by a court of record and spread upon the record by such court. However, county courts are no longer courts of record; they were deprived of that status by the 1945 Constitution. They no longer exercise judicial functions and are now mere agents for conducting the county's affairs in accordance with law. Consequently, it appears that the primary basis of the decisions in the Shipman and Ewing cases no longer exists.

Even if these cases are still to be followed, we feel that we are in no position to pass upon the question of whether or not

Honorable Christian F. Stipp

the county is entitled to recover the excess commissions retained for the years 1953 and 1954. We do not know, as above pointed out, all of the facts and circumstances surrounding the approval of the settlement by the county court for such years. Insofar as 1953 is concerned, we have no knowledge whatsoever of the surrounding circumstances. Perhaps both the collector and county court were ignorant of the fact that the limitations of Section 56.270 were applicable. In that event, the doctrine of the Shipman and Ewing cases might well prevent a recovery by the county of such excess fees.

Insofar as the year 1954 is concerned, circumstances indicate that the collector was aware of the application to him of the limitation contained in Section 52.270 at the time of the settlement, yet he saw fit to ignore it. The status of the court's knowledge is an unknown factor with us. However, it appears to us that since the collector was aware of the limitation and chose to ignore it, he would be in a position of overreaching if he failed to call the matter to the court's attention and should not be entitled to retain the benefits of such action. If, on the other hand, the limitation was called to the court's attention and the court chose to ignore it, such would not, in our opinion, constitute a mistake of law. As the court pointed out in the Lamar case, public officers "are trustees as to the public money which comes to their hands." The funds here involved were public funds and in dealing with them the county court occupied the position of trustee and could not ignore the limitations imposed by law in their dealing with such funds. As for the problem of constitutionality, the county court obviously would have no right to pass upon the constitutional question if it had been presented to them. State ex rel. Board of Mediation v. Pigg, 244 S. W. (2d) 75, 78.

Insofar as the right of the state to obtain repayment is concerned, we are of the opinion that there has been no formal settlement by the state with the collector for 1953 taxes, such as was involved in the Ewing and Shipman cases. The letter from the county supervisor merely advised the collector that the amounts shown on his settlement as having been paid to the state had been in fact deposited in the state treasury. This does not, in our opinion, constitute a formal settlement of the account such as to preclude the state's claim to the excess commissions retained.

Insofar as 1954 is concerned, there has been no approval in any respect of the settlement submitted and demand has been made for the payment of the excess commissions. The only basis suggested by you for holding that the collector is entitled as

Honorable Christian F. Stipp

a matter of law to retain all of the commissions received by him without limitation is that Section 52.270, insofar as it applies to county treasurers and ex officio collectors in counties under township organization, is in violation of Section 23 of Article III of the Constitution of Missouri, which provides, in part: "No bill shall contain more than one subject which shall be clearly expressed in its title, * * *." A similar provision was found in Section 28 of Article IV of the 1875 Constitution.

+ The provisions of Section 52.270 limiting the amount of commissions which the treasurer and ex officio collector in township organizations might retain was first inserted in an act found in Laws of Missouri, 1933, page 454. Prior to that time the corresponding section of the Revised Statutes of 1929, Section 9935, contained a provision "that this section shall not apply to any county adopting township organization." The title of the 1933 act read as follows:

"AN ACT to repeal section 9935 of Article 8, Chapter 59, Revised Statutes of Missouri, 1929, entitled 'Collectors and the Collection of Taxes,' and to enact a new section to be known as Section 9935 pertaining to the same subject: Providing for the rate of per cent which county collectors may charge for the collection of taxes; for the classification of counties for the purpose of fixing such rate of per cent, and limiting the total amount of compensation of such collectors and also of county treasurers and ex-officio collectors in counties under township organization." (Emphasis supplied.)

That act contained the following provision presently found in Section 52.270:

"* * * provided, however, that this section shall not apply to any county adopting township organization, so far as concerns the rate of per cent to be charged for collecting taxes, but shall apply to counties under township organization so far as to limit the total amount of fees and commissions which may be retained annually by the county treasurer and ex-officio collector for collecting taxes in such counties; * * *"

Honorable Christian F. Stipp

There can be no question that the title to the 1933 bill clearly revealed that it imposed a limitation upon the amount of commissions which might be retained by the county treasurer and ex officio collector in township organization counties. It could hardly have been more clearly stated than was done in the title. Whether or not the enacting clause made similar reference would be immaterial inasmuch as there is no requirement that the enacting clause set out in full the subject matter of the act. Therefore, the only question is whether or not the 1933 amendment engrafted upon Section 9935, R.S.Mo. 1929, a provision not germane to the original purpose of the section.

You have pointed out that Section 9935, R.S.Mo. 1929, was found in Article VIII, entitled, "Collectors and the Collection of Taxes," of Chapter 59, entitled, "Taxation and Revenue," of the Revised Statutes of 1929. No provision was found in that article relating to the compensation of county treasurers and ex officio collectors in counties under township organization. This was found in Section 12316 of Article 11, entitled, "County Treasurers as ex officio Collectors," of Chapter 86, entitled, "Township Organization," of the Revised Statutes of 1929. You state that "there was * * * absolutely no connection between Article 8 of Chapter 59 and Article 11 of Chapter 86, R.S.Mo. 1929." With this we must respectfully disagree. Section 12312 of Article 11, Chapter 86, R.S.Mo. 1929, expressly provided that the county treasurer and ex officio collector in counties under township organization should have the same power in the collection of certain taxes as vested in the county collector under the general laws of the state. Thus, obviously Article 11 of Chapter 86 required reference to Article 8 of Chapter 59 to ascertain the extent of the authority of the treasurer and ex officio collector in township organization counties. Article 11 of Chapter 86 did not purport to set up a complete scheme for the performance of the duties of the ex officio collector.

However, the problem essentially is whether or not the inclusion in Section 9935, R.S.Mo. 1929, of a provision limiting the commission which the treasurer and ex officio collector in township organization counties might retain was germane to the remainder of the section which dealt with the maximum commissions which might be retained by collectors in other than township organization counties. In our opinion, the matters are germane to the same general subject of compensation for services for the collection of taxes. Such was the over-all object of the section. To include county treasurers and ex officio collectors in township organization counties in the same section with county collectors generally certainly would not appear to be so foreign

Honorable Christian F. Stipp

to the over-all subject as to require its enactment in a separate act of the Legislature.

In 1948 the Legislature enacted a bill imposing a tax upon the use of the highways by motor vehicles. Laws of Missouri, 1947, Volume II, page 431. The bill was enacted as an amendment to the sales tax act. In the case of State ex rel. v. Bates, 359 Mo. 1002, 224 S. W. (2d) 996, the validity of the act was attacked on the grounds that it violated Section 23 of Article III because it contained unrelated and incongruous subjects, to wit, the sales tax and a use tax. The court denied this contention, stating, 224 S. W. (2d) 1. c. 998:

"Are sales taxes and use taxes on motor vehicles so incongruous and unrelated as to subject matter that, included in a single statute the prohibition of Section 23 of Article III is here violated?

"We have uniformly given a broad and reasonable construction to Section 23 of Article III of the Constitution which declares that no bill shall contain more than one subject which shall be clearly expressed in the title. State ex inf. McKittrick v. Murphy, 347 Mo. 484, 148 S.W.2d 527, Thomas v. Buchanan County, 330 Mo. 627, 51 S.W. 2d 95. And while that section of the Constitution is mandatory and subjects having no legitimate connection or natural relation cannot be joined in one bill, yet if the subjects covered by an Act are naturally and reasonably related, and have a natural connection with each other then the subject is single. Thomas v. Buchanan County, supra; Edwards v. Business Men's Assurance Co., 350 Mo. 666, 168 S.W.2d 82. It is not required that every separate tax or every separate legislative thought be in a different bill, but it is sufficient if the matters in an Act are germane to the general subject therein.
* * *

* * * * *

"* * * We hold that under the instant circumstances the use tax on motor vehicles

Honorable Christian F. Stipp

is legitimately connected and naturally related to the subject of sales taxes. Each tax is a related portion of a comprehensive tax system. A complementary use tax on motor vehicles enacted as an amendment of a same purpose Sales Tax Act did not violate the constitutional provision. Each is clearly germane to the other." (Emphasis supplied.)

There is a natural and reasonable relation between a limitation upon the compensation of county collectors generally and that of county treasurers and ex officio collectors in counties under township organization. Both relate to the same general subject of the amount of compensation which may be retained by officials charged with the responsibility for collecting taxes. In our opinion, the amendment of 1933 was germane to the original act and did not violate the constitutional prohibition against the inclusion of more than one subject in the same bill.

CONCLUSION

Therefore, it is the opinion of this office that a county treasurer and ex officio collector in a county under township organization who has retained commissions on taxes collected on behalf of the state in excess of the limitations contained in Section 52.270, RSMo 1949, is liable to the state for the return of such excess commissions. Insofar as liability to return such excess commissions to the county is concerned, it must be determined on the basis of all facts and circumstances surrounding approval by the county court of the collector's settlement. Where, however, the collector has been advised of the fact that his commission is subject to limitation and ignores such limitation, and the county court also ignores such limitation, the collector is liable for the return of such excess commissions.

We are further of the opinion that the inclusion in Section 52.270, RSMo 1949, of a limitation upon the amount of commissions which may be retained by the county treasurer and ex officio collector in township organization counties does not violate the provisions of Section 23 of Article III, Constitution of Missouri, 1945.

Honorable Christian F. Stipp

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

John M. Dalton
Attorney General

RRW:ml;LC

SCHOOLS: School districts affected by Senate Bill No. 286,
SCHOOL DISTRICTS: 68th General Assembly, should not revise estimates
TAXATION: and tax levies until after October 4, 1955.



September 8, 1955

Honorable H. K. Stumberg
Prosecuting Attorney
St. Charles County
Courthouse
St. Charles, Missouri

Dear Mr. Stumberg:

This is in response to your request for opinion dated
August 24, 1955, which reads as follows:

"I will appreciate your rendering your
official opinion to me on the following
questions:

"If the electors of three director school
district at either the annual or a special
meeting votes a minimum levy of \$1.00 for
teacher and incidental purposes in order
to qualify under the provisions of Senate
Bill No. 3 should it become law?

"(a) Will that district be forced to
reduce its levies below \$1.00 under Senate
Bill No. 286 in light a county wide in-
crease of more than 10% in assessment
ordered by the State Tax Commission after
the school meeting?

"(b) May the district in submitting a
revised estimate under Senate Bill No.
286 increase the allowance for an operating
balance to offset the districts 'antici-
pated' reduction in the apportionment of
State School moneys under the provisions
of Senate Bill No. 3 should it become law
even though such an estimate would produce
substantially more taxes than was pre-
viously estimated to be produced under
the original levy?"

Honorable H. K. Stumberg

When you refer to a special meeting at which a levy of one dollar for teacher and incidental purposes is voted, we assume you mean a meeting held prior to the effective date of Senate Bill No. 286, 68th General Assembly, for otherwise said bill would not be applicable.

Senate Bill No. 286 expressly provides that: "No levy for public schools or libraries shall be reduced below a point that would entitle them to participate in state funds." Senate Bill No. 3, 68th General Assembly, to which you refer and which will be voted on by the people on October 4, 1955, provides in Section 2 that:

"A school district shall receive state aid for its educational program only if it:

* * * * *

"(3) Levies a property tax of not less than one dollar for current school purposes on each one hundred dollars assessed valuation of the district."

"School purposes" is also defined therein as meaning "teacher and incidental funds."

If a school district levying a tax of one dollar on each one hundred dollars assessed valuation were required at this time to reduce its levy below one dollar on the basis of the present law, it would thereby be rendered ineligible for state aid if Senate Bill No. 3 is approved by the voters on October 4. We cannot believe that this was the intention of the Legislature in enacting Senate Bill No. 286.

It has been held that acts passed by the same session of the Legislature relating to the same subject matter must be construed together in order to arrive at the true legislative intent. In *Hull v. Baumann*, 345 Mo. 159, 131 S.W. (2d) 721, 725, the court quoted from *State ex rel. Karbe v. Bader*, 336 Mo. 259, loc. cit. 268, 78 S.W. (2d) 835, loc. cit. 839, as follows:

"We think the applicable rule is: "That where two acts are passed at the same session of the Legislature, relating to the same subject-matter, as here, they are in pari materia, and, to arrive at the true legislative intent, they must be construed together. *Forry v. Ridge*, 56

Honorable H. K. Stumberg

Mo. App. 615; State ex rel. v. Clark,
54 Mo. 216; State ex rel. v. Klein, 116
Mo. 259, 22 S.W. 693; St. Louis v. Howard,
119 Mo. 41, 24 S.W. 770, 41 Am. St. Rep.
630. * * * Gasconade County v. Gordon,
241 Mo. 569, 145 S.W. 1160, 1163. The
opinion in which case says further:

"In Black on Interpretation of Laws,
in speaking of statutes in pari materia,
it is said: 'Especially is it the rule
that different legislative enactments
passed upon the same day or at the same
session, and relating to the same subject,
are to be read as parts of the same act.'"

Since these acts in respect to the question under considera-
tion deal in part with the same subject matter, i.e., state aid
to schools, we believe they should be construed together as if
they were parts of the same law.

Reading the two acts together leads one to the obvious
conclusion that the Legislature did not intend by Senate Bill
No. 286 to deprive any school district of state aid. At the
same time, it is not known whether Senate Bill No. 3 will or
will not become law. The Legislature must have also recognized
that the tax books are not required to be turned over to the
collector until October 31 (Sec. 137.290, RSMo 1949), and there-
fore did not intend to require school districts to revise their
tax levies until after October 4 when it will be known whether
or not Senate Bill No. 3 is to become law.

Senate Bill No. 286 also provides that: "Where the taxing
authority is a school district it shall only be required hereby
to revise and lower the rates of levy to the extent necessary to
produce from all taxable property substantially the same amount
of taxes as previously estimated to be produced by the original
levy, plus such additional amounts as may be necessary approxi-
mately to offset said district's reduction in the apportionment
of state school moneys due to its increased valuation." (Emphasis
ours.)

We are not prepared to assume that if Senate Bill No. 3
becomes law that there would be a reduction in state aid because
of the increased valuation, but assuming that there would be,
we do not believe that a school district would be justified in
revising its estimate on the basis of "anticipated" reduction

Honorable H. K. Stumberg

in apportionment of state school moneys under Senate Bill No. 3. Rather, we believe that school districts affected by Senate Bill No. 286 should wait until after October 4, 1955, to revise their estimates and tax levies in accordance with Senate Bill No. 286 in an amount dependent upon whether Senate Bill No. 3 is approved by the people or not.

CONCLUSION

It is the opinion of this office that school districts affected by Senate Bill No. 286 of the 68th General Assembly should wait until after October 4, 1955, to revise their estimates and tax levies, at which time it will be known whether Senate Bill No. 3 of the 68th General Assembly is to become law.

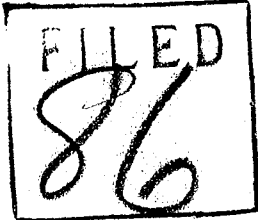
The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml

PROSECUTING ATTORNEYS: The fees allowed the attorney for the collector
TAXATION: under the provisions of Section 140.740, RSMo
FEES: Cum. Supp. 1953, should be taxed as costs in
suits brought by the prosecuting attorney in a
county of the second class on delinquent tangible personal property
tax bills and that such fees when received by the office of the
prosecuting attorney should be turned over to the county treasury
at the end of each month as provided in Section 56.340, RSMo 1949.



November 22, 1955

Honorable Lyndon Sturgis
Prosecuting Attorney
Greene County
Springfield, Missouri

Attention: Mr. Benjamin C. Franeka,
Assistant Prosecuting Attorney.

Dear Mr. Sturgis:

Reference is made to your request for an official opinion of this
office, which request reads, in part, as follows:

"* * *Please advise as to whether the fees as
outlined in Section 140.740 for attorneys are
to be taxed as costs in suits brought by the
Prosecuting Attorney on delinquent tax bills,
and whether these fees are then to be turned
over to the County Treasury as provided in
Section 56.340, RSMo 1949."

You first inquire whether the fees as outlined in Section 140.740
RSMo Cum. Supp. 1953, are to be taxed as costs in suits brought by the
prosecuting attorney on delinquent tangible personal property tax bills.
Said section provides as follows:

"1. Before any suit shall be brought to recover
delinquent tangible personal property taxes, the
collector shall notify the delinquent taxpayer by
regular mail, addressed to the last known address
of such taxpayer, that there are taxes assessed
against him, stating the amount due and the years
for which they are due, and that if the same are
not paid within thirty days an action will be
brought to recover such taxes; for which notice
a fee of twenty-five cents may be charged and
collected by the collector. In any action to
recover said personal property taxes a certificate
of the collector that he has mailed said notice as

Hon. Lyndon Sturgis

herein required and giving the date of such mailing shall be attached to the petition and shall constitute prima facie evidence that such notice has been duly given.

"2. In each such action a fee in the amount of ten per cent of the taxes due, but in no event less than five dollars, shall be allowed the attorney for the collector. Such attorney fee and all collector's fees shall be included in the judgment for taxes in such action."

This section relates to suits for the collection of delinquent tangible personal property taxes and provides that a fee in the amount of 10% of the taxes due, but in no event less than \$5.00, shall be allowed the attorney for the collector and included in the judgment. The latter provision is clear and unequivocal in its terms that such fees shall be included in the judgment for taxes.

As was stated in an opinion of this office to J. T. Campbell, Representative of Buchanan County, under date of April 28, 1953, the purpose of said statutory provision is to require delinquent taxpayers to bear at least a portion of the expense of collection. It is our opinion that such fees should be taxed and allowed as costs in all suits brought by the prosecuting attorney for the collection of delinquent property taxes.

You next inquire whether such fees are to be turned over to the county treasury as provided in Section 56.340, RSMo 1949. Said Section reads as follows:

"The prosecuting attorney, in counties of the second, third and fourth classes, shall charge upon behalf of the county every fee that accrues in his office and receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, one of which he will immediately file with the clerk of the county court, and shall at the same time make out an itemized and accurate list of all fees in his office which have been collected by him, and one of all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the county court, stating that he has been unable, after the exercise of diligence, to collect the part unpaid, said report to be verified by affidavit, and it shall be the duty of the county court to cause the fees unpaid to be collected by law, and to cause the same when

Hon. Lyndon Sturgis

collected to be turned over to the county treasury."

Section 56.270, provides for the salary of the prosecuting attorney of counties of the second class as follows:

"The prosecuting attorney, in all counties of the second class, shall receive for his services, an annual salary of five thousand dollars, to be paid in twelve equal monthly installments, by the county, by warrants drawn on the county treasury."

In view of the fact that the prosecuting attorney in a county of the second class receives a salary in lieu of fees it is our opinion that the fees provided for in Section 140.740, RSMo Cum. Supp. 1953, are the type which accrue to the office under the provisions of Section 56.340, and must be paid over to the county treasury at the end of each month.

CONCLUSION

Therefore, it is the opinion of this office that the fees allowed the attorney for the collector under the provisions of Section 140.740, RSMo Cum. Supp. 1953, should be taxed as costs in suits brought by the prosecuting attorney in a county of the second class on delinquent personal property tax bills and that such fees when received by the office of the prosecuting attorney should be turned over to the county treasury at the end of each month as provided in Section 56.340, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

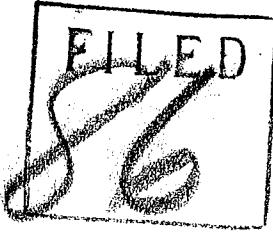
Yours very truly,

John M. Dalton
Attorney General

DDG:mw

PRIVATE CARRIERS: A manufacturing company that transports
PUBLIC SERVICE its own products in furtherance of its
COMMISSION PERMITS: business is a private carrier.

December 29, 1955



Honorable Lyndon Sturgis
Prosecuting Attorney
Greene County
Springfield, Missouri

Attention of Robert R. Northcutt
Assistant Prosecuting Attorney

Dear Sir:

You state in your request for an opinion from this office
as follows:

"The problem is this. A Missouri cheese manufacturing company manufactures cheese of different varieties upon order for Wilson & Company. This cheese is labeled and packaged in Wilson & Company containers. The cheese is ordinarily ordered from the Wilson & Company office in Chicago to be delivered to a store or warehouse outside of the State of Missouri. The cheese plant manufactures upon order and loads the cheese, which is marked Wilson & Company, into their own trucks for out of state delivery. The bills of lading which go along with the truck are all marked Wilson & Company, Inc., consignor, and the recipient, of course, consignee. The same day that the cheese manufacturing company ships this cheese from its plant, Wilson & Company in Chicago is billed for the cheese. The claim of the cheese manufacturing company is that this cheese remains their property until delivered to the consignee and, therefore, they claim that they do not need

Honorable Lyndon Sturgis

any Public Service Commission authority for their trucks. It is our contention, of which we are not sure, that even though they manufacture this cheese and even though they deliver it in their own trucks, that according to the above set out facts, they should be required to have Public Service Commission authority. This is the question we wish answered."

From the facts thus submitted it is clear that the manufacturing company does not "hold itself out to the general public to engage in transportation * * * for hire or compensation * * *." Therefore, the answer hinges upon a determination of whether or not by such an arrangement as you mention, the manufacturing company should be classified as a contract or a private carrier. Of course, if it is a private carrier, it is according to Section 390.031, V.A.M.S., exempt from regulation.

Section 390.020, paragraph 5, V.A.M.S., defines a common carrier as:

"The term 'common carrier', unless modified by words including common carriage by other facilities, means any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for hire or compensation upon the public highways."

Section 390.020, paragraph 6, defines a contract carrier as:

"The term 'contract carrier' means any person which, under individual contracts or agreements, engaged in the transportation (other than transportation referred to in subsection 5 of this section) by motor vehicle of passengers or property for hire or compensation upon the public highways."

Section 390.020, paragraph 7, defines a private carrier as:

Honorable Lyndon Sturgis

"The term 'private carrier' means any person engaged in the transportation by motor vehicle upon public highways of persons or property, or both, but not as a common carrier by motor vehicle or a contract carrier by motor vehicle; and includes any person who transports property by motor vehicle where such transportation is incidental to or in furtherance of any commercial enterprise of such person, other than transportation."

Some pertinent questions that immediately arise are: Do the facts as stated show that individual contracts or agreements are made for the transportation of the cheese "for hire or compensation"; Does this make any difference; Does the title to the cheese pass to Wilson & Company when it is packaged and loaded in Springfield; Does it matter who owns the property when it is transported; Is the transportation of the cheese in this situation "incidental to or in furtherance of" the commercial enterprise of manufacturing it as contemplated in paragraph 7 of Section 390.020, V.A.M.S.

A further question arises, though we think of less importance here: Does said paragraph 7 of Section 390.020 contemplate the transportation only of one's own property incident to or in furtherance of its enterprise? The Missouri courts have not determined these questions. The Missouri statutes are similar in many respects to the federal statutes concerning motor carriers.

49 U.S.C.A., 303(14), contains the same definition for a common carrier by motor vehicle as does the Missouri statute.

49 U.S.C.A., 303 (15), defines a contract carrier by motor vehicle as follows:

"The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) of this section and the

Honorable Lyndon Sturgis

exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

49 U.S.C.A., 303(17), defines a private carrier by motor vehicles as follows:

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

Your stated facts do not show whether or not there is any compensation for the transportation of the cheese from Springfield to the destination. Nevertheless, such will be presumed herein.

If title passes as soon as the cheese is labeled and loaded, then there is compensation for transporting Wilson's property; if the title does not pass until delivery to the consignee, then there is compensation to the manufacturing company for transporting its own property. However, in the latter case, the transportation would likely be "incidental to" or "in furtherance of" its commercial enterprise. It is pointed out that ownership alone is not the sole determining factor in your problem. If the transportation of the cheese was the main business here, as seems required by paragraph 6 of Section 390.020, ownership of the cheese transported would not take the manufacturing company out from under the permit requirements. One can be, under certain circumstances, a contract carrier even though hauling his own goods, but in that case the transportation of it would have to be the main enterprise.

In the case of A. W. Stickle Co. v. Interstate Commerce Commission, 128 Fed. (2d) 155, the Stickle Company bought lumber at mills, and delivered it itself to its purchasers. The sales

Honorable Lyndon Sturgis

price exceeded the purchase price by approximately the same amount that contract or common carriers would charge for the same services. The court said, l. c. 160:

"Ownership of the commodity transported is not the sole test. The primary test in sections 203(a) (14) and 203(a) (15) is transportation for compensation."

(Note: the 203(a) referred to herein in the Interstate Commerce Act is Section 303 in the U.S.C.A.)

The court further said that under the facts in that case "The transportation is not merely incidental to the business of selling lumber. It is a major enterprise in and of itself."

If one owns the property and there is no charge for transporting it, he is clearly a private carrier.

In the case of Interstate Commerce Commission v. Tank Car Oil Corporation, 151 Fed. (2d) 834, the company owned the oil, sold it at destinations at competitive community prices. It hauled the oil in its own trucks, retained title until delivery. The court said, l.c. 836:

"Under the facts the defendant comes clearly within the statutory definition of a private carrier of property by motor vehicle. The defendant: (a) was the owner of the property transported; (b) was transporting it for sale; and (c) was transporting it in furtherance of its commercial enterprise as a dealer at wholesale and retail in the products which it transported. * * *"

Your stated facts do not bring your case clearly within the holding of either of these two cases. The manufacture of not the transportation of the cheese, remains the major enterprise and compensation for transporting it is presumed.

Honorable Lyndon Sturgis

The federal cases have further held that compensation alone is not the primary test. The test appears to be: is the main agreement one to engage in transportation for compensation.

In the case of Brooks Transp. Co. et al. v. United States et al., 93 Fed. Supp. 517, the court said, l. c. 524:

"The history of the Act, we think, completely demolishes the validity of plaintiff's compensation criterion and supports the Commission's criterion of Primary business purposes."

The court had further stated in this case, l.c. 522:

"The Commission, in deciding that Lenoir and Schenley were private carriers, as opposed to contract carriers or common carriers, applied what is known as the primary business test. In other words, if it is established that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that business and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item. The Commission has so held consistently in its interpretation of the statutory provisions regulating the various categories of motor carriers. See Congoleum-Nairn, Inc., Common Carrier Application, 2 M.C.C. 237; D.L. Wartena, Inc., Common Carrier Application, 4 M.C.C. 619; Swanson, Contract Carrier Application, 12 M.C.C. 516; Murphy Common Carrier Application, 21 M.C.C. 54; Dull Contract Carrier Application, 32 M.C.C. 158; Woitishek Common Carrier Application, 42 M.C.C. 193."

Honorable Lyndon Sturgis

In this case both the Lenoir Chair Company and the Sehenley Company made transportation charges for their products to various destinations comparable to those of common, rail or motor carriers and showed the figure separately on their invoices.

Under the federal statute it is clear that one can transport his own property for sale, lease, rent or bailment or in furtherance of any commercial enterprise, if such transportation does not become the major enterprise or activity in itself.

Under the state statute it is not clear whether or not one may transport property belonging to another and still be classified as a private carrier, even if the transportation is in furtherance of one's commercial enterprise or incidental to it. It is our understanding, however, that the Public Service Commission has interpreted our statute, 390.020, paragraph 7, as applicable only to the transportation of one's own property.

Naturally, the Commission's conclusions of law do not have the same claim to finality as do their findings of fact; nevertheless the courts, through the years, both state and federal, have given great weight to the interpretation of an act by an agency enjoined with the responsibility of administering it.

From your statement "The cheese is ordinarily ordered from the Wilson & Company office in Chicago to be delivered to a store or warehouse outside of the State of Missouri," one may safely conclude that the contract is not complete between the Springfield company and Wilson's until delivery is made, and that the parties intended that title would not pass until then. The time for the passing of title depends upon the intent of the parties. See Keen v. Rush, 19 S. W. (2d) 25 and Calcara v. United States, 53 Fed. 767.

It is admitted that the fact that the Springfield company prepares bills of lading with Wilson's as consignor, instead of trip tickets or some other type of document, is inconsistent with the company's claim of ownership. However, this could well be explained as a matter of convenience to the Springfield company. The packaging of the cheese in Wilson's containers, or containers with Wilson's labels, whether in compliance with an agreement or performed as a service, is, we think, not a controlling factor in the question of ownership.

Honorable Lyndon Sturgis

You state that the manufacturing company bills Wilson & Company on the same day that the cheese is shipped, but its claim of ownership, and transportation of the cheese in its own trucks, the practice of various factories and commercial concerns that do the same thing, all combine to lead us to the conviction that the manufacturing company would run the risk of loss or damage in transit, and all combine to lead us to the conviction that the cheese remains the property of the manufacturing company until delivered at its destination, and lead us to believe that the parties so intend, notwithstanding the few minor factors that you cite that indicate the contrary.

CONCLUSION

We therefore conclude that under your statement of the facts in the present case, the cheese manufacturing company is primarily engaged in the manufacture and the sale of cheese which it transports incidental to and in furtherance of that business, and that the transportation of such goods is private carriage, even though a charge for transportation might be included in the selling price or even might be added thereto as a separate item, and that the cheese manufacturing company should properly be classified as a private carrier and thus, under the provisions of Section 390.031, V.A.M.S., exempt from the regulations of motor carriers and contract haulers.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

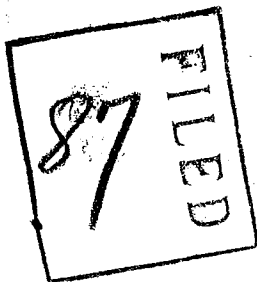
Very truly yours

John M. Dalton
Attorney General

RSN:lc

COMMITTEEMAN:
COMMITTEEWOMAN:
VOTERS:
REWARDS:

A township committeeman or committeewoman who accepts an award of money for inducing any other person or persons to vote in any election is guilty of a misdemeanor and can be punished by imprisonment in the county jail for not less than one month nor more than one year, and the accepting of such an award for doing such acts is illegal.



October 24, 1955

Honorable Gordon S. Summers
Representative, Crawford County
Bourbon, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"I am enclosing a copy of the October 6, 1955 edition of the Crawford Mirror which contains a story of an award of one hundred dollars presented to the Republican Committeeman and Committeewoman for getting out the greatest percentage of voters in their township during the General Election, 1954.

"Is this legal? Rumor also has it that the Republicans in Crawford County are going to give other awards for getting out the votes in the coming election.

"I would like to know if there is a violation of law relative to the above.

"Trusting that everything is going well with you and your staff, I remain, * *"

The first paragraph of the newspaper account of this reward states as follows:

"Previous to the election in November of 1954, Mr. A. D. Welsh offered a prize of \$100.00 to the committeeman and committeewoman who would get to the polls the greatest percentage of voters in their respective township."

Honorable Gordon S. Summers

Section 120.750 through Section 120.840, have to do with party committees, committeemen and committeewomen of the state and the political subdivisions thereof. There is nowhere therein any provision that a township committeeman or committeewoman cannot legally accept an award for getting out the most voters in their township in the county, but paragraph two of Section 129.020, RSMo 1949, reads as follows:

"The following persons shall also be deemed guilty of bribery at elections, and shall be punished accordingly:

"(2) Every person who shall, after any election, directly or indirectly, by himself, or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or refrain from voting at any election; and any person so offending shall be guilty of a misdemeanor, and shall be punished by imprisonment in the county jail not less than one month and not more than one year."

Thus, this section states that any person, whether a township committeeman or committeewoman, or private person, who receives any money on account of having induced any other person to vote shall be guilty of a misdemeanor and shall be punished by imprisonment in the county jail not less than one month nor more than one year. Under the facts presented by you and by the newspaper account of this award, if the Osage Township committeeman and committeewoman have induced other persons to vote in order to win this award and having accepted the award for so doing, then they would be guilty of violating this section and thus it is illegal for a committeeman or committeewoman to accept the award for having induced other persons to vote at any election.

CONCLUSION

A township committeeman or committeewoman, who accepts an award of money for inducing any other person or persons to vote in any election is guilty of a misdemeanor and can be punished by imprisonment in the county jail for not less than one month nor more than one year, and the accepting of such an award for doing such acts is illegal.

Honorable Gordon S. Summers

The foregoing opinion, which I hereby approve, was prepared by my assistant, Harold L. Volkmer.

Yours very truly,

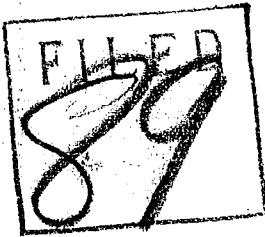
John M. Dalton
Attorney General

HLV:vlw

TAXATION:

DELINQUENT TAXES:

Treasurer and ex-officio collector of county of the third class under township organization is not required to collect delinquent taxes of city of the fourth class.



February 21, 1955

Honorable George S. Thompson
Prosecuting Attorney
Chariton County
Salisbury, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The treasurer and ex officio collector of Chariton County has asked me to secure an opinion from your office as to whether or not a collector in a fourth class county, under township organization, is required to accept delinquent tax lists from cities of the fourth class. I note that V.R.S.M. 1949, Sec. 140.070, seems to indicate that such collector would be required to accept such delinquent lists from such cities. However, it seems to me that V.R.S.M. 1949, Sec. 94.320 (3), is controlling and relieves the county collector from any duty imposed by the above mentioned sec. 140.070.

"Will you kindly send me an opinion on the above matter. The treasurer has indicated that several fourth class cities intend to deliver their delinquent tax lists to him on March 1, 1955. Anything which you might do to expedite your opinion would be greatly appreciated."

It is observed that in your letter you have inadvertently referred to Chariton County as being one of the fourth class. However, an examination of Chapter 48, RSMo 1949, indicates that it is actually one of the third class. Our opinion hereafter expressed is based upon the laws applicable to counties of the latter classification.

Honorable George S. Thompson

Section 140.070, RSMo 1949, referred to in your letter of inquiry, reads as follows:

"All back taxes, of whatever kind, whether state, county or school, or of any city or incorporated town, appearing due upon delinquent real estates shall be extended in the back tax book made under this chapter, and in case the collector of any city or town shall have omitted or neglected to return to the county collector a list of delinquent lands and lots, as required by section 140.670, the present authorities of such city or town may cause such delinquent list or lists to be certified, as by said section contemplated, and such delinquent taxes shall be by the county clerk put upon the back tax book and collected by the collector under authority of this chapter; provided, that in all cases where the auditor or other proper officer is required by provision of charter of any city of five thousand or more inhabitants to make the list for city delinquent taxes in this section provided, and to deliver the same to the collector or other proper officer of such city, such collector or other proper officer shall proceed to collect such delinquent list in such back tax book, so made out and delivered to him by the auditor or other proper officer of such city, in the manner and under authority prescribed by this law, and the chapter to which this is amendatory."

Section 94.320, RSMo 1949, also referred to in your letter of inquiry, after providing for the preparation of delinquent land and personal lists for cities, contains the following provision:

"The board shall return the delinquent lists to the collector, charging him therewith, and he shall proceed to collect the same in the same manner as provided by law for state and county taxes."

Honorable George S. Thompson

These various and apparently conflicting statutes have been under consideration by the Supreme Court of this state upon several occasions. In State ex rel. Steed et al. v. Nolte, reported 138 S. W. (2d) 1016, the Court had for resolution the following two questions: (1) What is the proper method of collecting delinquent real estate taxes due a city of the fourth class in St. Louis County? (2) What officer should collect such taxes? You will note that with the exception of St. Louis County being of much greater population than Chariton County, which fact was not material to the determination of the questions, the problems are identical.

In disposing of the questions presented, the Court held, 1. c. 1019:

"Relators contend that not only must the taxes of respondent city be collected by advertisement and sale as outlined in the original Jones-Munger law, but also that they must be collected by county and not city officers. Relators base this claim on sections 9970 and 9971, R. S. Mo. 1929, Mo. St. Ann. sections 9970, 9971, pp. 8012, 8013; and on certain sections of the Jones-Munger law. Section 9970 provides that the collectors of all cities having authority to levy and collect taxes shall annually return to the county collector all unpaid real estate assessments and section 9971 provides that the county collector shall have power to collect such assessments. These sections were first enacted in 1872, Laws of 1871-72, page 118, at a time when no city had a lien for, or the power to collect, city taxes. In 1879 and later, as we have already pointed out, various classes of cities were granted a lien for and the power to collect their own taxes. Notwithstanding this, sections 9970 and 9971 have been retained in the statutes and section 9970 was repealed and reenacted in substantially the same form in 1933, the only change being to substitute the words 'first Monday in March' for the words 'first day in May.' Laws of 1933, page 450. The apparent conflict between the statutes now numbered 6995 and 9970, 9971, respectively, was considered by

Honorable George S. Thompson

this court in the case of City of Aurora ex rel. v. Lindsay, 146 Mo. 509, 48 S. W. 642, decided in 1898. It was there held that the city collector, not the county collector was the proper officer to collect taxes due a city of the fourth class. That ruling has not since been departed from; so, when the General Assembly repealed and reenacted section 9970 in 1933, in the same form, they are presumed to have adopted the construction so placed on the statutes by this court. State ex inf. Gentry v. Meeker, 317 Mo. 719, 296 S. W. 411. In other words, said section 9970, both before and after its reenactment in 1933, was and is applicable only to the limited number of cities above mentioned, which still return their delinquent taxes to county instead of city officers. The expression 'such cities', appearing sections 9949, 9950, and other sections of the Jones-Munger law and of the Revised Statutes, Mo. St. Ann. sections 9949, 9950, p. 7991, refers to such cities as from time to time have been granted the power to collect their own taxes, and those sections vest in city officers the same duties as to city taxes as are exercised by county officers as to other taxes. Section 9963c makes this clearer by requiring us to read the word 'city' into the various sections where the word 'county' appears.

"Our conclusions in this case apply only to the collection of city taxes in cities of the fourth class. Other cities are governed by different statutes which may or may not compel a different result.

"We hold that the taxes of respondent city should be collected by its proper city officers, but in the manner provided by the Jones-Munger law and not by suit as attempted in the instant case. Accordingly, our provisional rule should be and is hereby made absolute.

Honorable George S. Thompson

CONCLUSION

In the premises, we are of the opinion that the county treasurer and ex-officio collector of a county of the third class under township organization is not required to collect delinquent taxes of cities of the fourth class.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Will F. Berry, Jr.

Very truly yours,

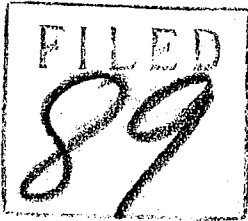
JOHN M. DALTON
Attorney General

WFB, Jr.:da

SPECIAL ELECTION:
ELECTIONS:
SENATE JOINT RESOLUTION
No. 9, 68th GENERAL ASSEMBLY:

In the legal notices published prior to the January 24, 1956 election called by the Governor, it must be designated a "special election."

November 29, 1955



Honorable William E. Tipton
Board of Election Commissioners
County Court House
Kansas City 6, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion of this office, which request is as follows:

"For the purpose of writing up our legal notices and publications for the subject election, we would appreciate receiving from your office an opinion on the legal title of said election. Is it a 'special election'? a 'special bond election'? a 'special referendum election'? or otherwise?

"We would appreciate receiving your reply at your earliest convenience, as our various notices must be prepared soon."

Senate Joint Resolution No. 9, 68th General Assembly, provides for the submission to the voters of an amendment to Article III of the Missouri Constitution. The resolution states that this election shall be held at the next general election, in November, 1956, "or at a special election to be called by the governor in his discretion prior to such general election."

On November 9, 1955, Governor Phil M. Donnelly, in a proclamation, called "a special election to be held in this state on the _____ day of _____, 1955, to be conducted in the manner provided by law; at which special election there shall be submitted to the electors, by its official ballot title, the foregoing proposed amendment to the Constitution; the same to appear on a separate ballot as required by Section 2(a) of Article XII of the Constitution."

Honorable William E. Tipton

It is our view that this election, called a "special election" by both the Senate Joint Resolution and the Governor's proclamation, should be designated a "special election" in the legal notices required to be published prior to the balloting.

CONCLUSION

It is, therefore, the opinion of this office that, in the legal notices published prior to the January 24, 1956 election called by the Governor, it must be designated a "special election."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Walker La Brunerie, Jr.

Yours very truly,

John M. Dalton
Attorney General

WLaB:am:hw

CHattel MORTGAGE: : A Recorder of Deeds has no statutory or
MOTOR VEHICLE: : other authority to defer the endorsement
CERTIFICATE OF TITLE: : on a certificate of title to a motor vehicle
: the date of the filing of a chattel mortgage
: on such motor vehicle to a later date and
: back date the date of the endorsement on
: such certificate of title to make it appear
: to have been made on the same date of the
: original filing of such chattel mortgage.
.....



March 23, 1955

Honorable Ernest Troutman
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Mr. Troutman:

This is the opinion you requested from this office as to the authority of the Recorder of Deeds to endorse the date of the filing of a chattel mortgage securing a loan on an automobile on the certificate of title to such automobile at a later date than the date of the recording of the chattel mortgage itself and back date the endorsement of the date placed on such title to conform to and be the same date as the date of the original filing for record of such chattel mortgage as it appears on such mortgage.

Your letter requesting an opinion on the subject reads as follows:

"The Recorder of Deeds of Carroll County, has requested that I write you for an opinion which involves the following situation:

"A mortgage holder, a bank, has during the past two years at various times, had recorded a series of chattel mortgages for loans made on automobiles. The titles to the automobiles were not presented and stamped at the time of recording. The bank has now collected the auto titles on their outstanding chattel mortgages and has presented them to the recorder, requesting that he now stamp them, showing the same date as the filing date.

"The Recorder requests an opinion as to whether he is authorized to now stamp the

Honorable Ernest Troutman:

titles submitted, and back date the stamp to the date of the original filing."

Section numbers of the statutes herein refer to RSMo 1949.

Section 443.480 defining the duties of the Recorder of Deeds respecting the endorsement of the date of the filing of a chattel mortgage on the certificate of title to a motor vehicle, and naming other duties incident to the release of such chattel mortgages, and noting certain things as exempt from the terms of the section, and noting the effect of the failure to endorse such filing date on such certificate of title when the chattel mortgage is filed, as a notice, reads as follows:

"It shall be the duty of the recorder of deeds on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. In all counties now or hereafter having a population of three hundred thousand inhabitants or less the recorder shall receive for services herein provided a fee of twenty cents; in all counties now or hereafter having a population of three hundred thousand inhabitants or more the recorder shall receive for services herein provided a fee of thirty cents. A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided; provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price or any part thereof or to a motor vehicle sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."

Honorable Ernest Troutman;

This section has been before the appellate courts of this State for the construction of some of its various terms in numerous cases. The provision in the section exempting from the terms thereof of the endorsement of the date of the filing of the chattel mortgage given to secure the purchase price or any part thereof, on the certificate of title, as not required to be placed thereon by the Recorder of Deeds at the request of the mortgagee or his assigns, was considered and construed by the Springfield Court of Appeals in Butler County Finance Co. vs. Prince, 231 S.W. (2d) 834, and held to be clear and not subject to doubt where the Court, l.c. 836, quoting from another and earlier decision of that Court involving the same legal principle, said:

"The provisions of this statute are so clearly stated that there can be no doubt but the legislature intended it to apply to any mortgage given to secure the purchase price or any part thereof, of a motor vehicle, from whomsoever purchased,

"This note was given for part of the purchase price of the motor vehicle and therefore the requirement that a record of it be noted on the certificate of title does not apply."

The provision in said section that "A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided;" was considered and discussed by the Kansas City Court of Appeals in Kansas City Automobile Auction Co. vs. Overall, 238 S.W. (2d) 446. It appears from the facts, as recited in the case, that the evidence showed it was the practice of the Recorder to endorse the filing of a mortgage on a certificate of title at any time requested, regardless of the date of the filing of the mortgage. In such statement, relating to the official acts of the Recorder in regard to his practices in such matters, it appeared that in some cases the date of the filing of the mortgage was not endorsed on the title for days, weeks, or months after the filing of the mortgage. In other cases such endorsement

Honorable Ernest Troutman:

was made on the certificate of title showing a date before the date the certificate of title itself was issued, thus leaving the question of the date when such endorsements were made unascertainable, and that the date of the endorsement on the certificate of title, and, therefore, the effective date of the notice thereby involved, were disputed facts. The court, in that case, in regard to the office to be served by the notice, called attention, *l.c.* 452, to Section 3488 (R.S. Mo. 1939, A.L. 1941, pp 327, A.L. 47, Vol. II, p. 220, now Section 443.480) where the court, discussing the question, said:

"The general rule stated in Section 3488, is that the filing of the mortgage on a motor car is not notice 'to the whole world' until such fact is noted on the title certificate, unless the mortgage is for part of the purchase price. Absent such endorsement of a mortgage not for part of the purchase price, a person acquiring such car without actual notice of the existing mortgage, would have no knowledge of it at all. * * *."

While the courts of Missouri have not in terms condemned the practice of deferring the making of such endorsements on certificates of title to a later time than the date of the filing of chattel mortgages, the implications to be drawn from the decision in the case cited showing the confusion and uncertainty created by following the practice, as such deferments may affect the rights of subsequent mortgages and those who have fixed rights and interests in the subject-matter and the public generally, such decisions in the discussion of this principle indicate that the appellate court in the Overall case, *supra*, thought the practice was not to be approved or commended. The court evidently thought it should be enough to say that, with the exceptions noted, it was sufficient to strictly obey the terms of the section, and that, in effect, was the holding of the court.

53 C.J., page 609, under the subject of "Records", discussing the filing of documents as the date of filing as shown thereon, or the deferment of the endorsement

Honorable Ernest Troutman:

of the filing date to a later time, may or may not affect its validity states the following text:

"To constitute a valid filing, the instrument must not only be presented at the proper place, but also within the proper time, such time depending usually upon statutory provisions. An instrument is filed when it is deposited in the proper office with the person in charge thereof, with directions to record it, although not within the time that the office is required by statute to be kept open. Further, an instrument is filed at the time of its actual delivery to the proper officer and at the proper office for filing, or, where it is delivered to him at a place other than the proper office, at the time of its actual deposit by him in such office, and his failure to indorse the date of filing on the instrument, or his delay in placing a file mark thereon, or his indorsement thereon of a later date is immaterial. The proper officer's indorsement of a date of filing on the instrument is prima facie proof of filing on such date, but it may be shown that such indorsed date is not the true date of filing; or, as otherwise expressed, the date of filing indorsed on the instrument by the proper officer is prima facie the date of actual filing, and must control until it has been shown by competent and clear evidence to be incorrect. * * *."

Footnote 8 to such text, on the same page, cites Balm vs. Cape May, 3 N.J. Misc. 58, 127 A. 88 (aff 101 N.J.L. 400, 127 A. 923). That was a case involving the filing of a petition by electors calling for a special election. On the question of the authority of an officer whose duty it is to file instruments and endorse thereon the date of filing, the court in that case, l.c. 89, said:

"Upon the question of the date of filing it is the rule that the date of filing indorsed upon a document by the official

Honorable Ernest Troutman:

with whom it is required to be filed is prima facie proof of its filing on such date. It is likewise true that it may be shown that such indorsed date is not the true date of filing, but I know of no authority permitting an official to receive a document required by statute to be filed with him or in his office and withhold it from his files to some subsequent date unless so authorized by statute.

The decision in that case is persuasive here on the point. We have no statute in this State authorizing a Recorder of Deeds to defer to a later date the endorsement of the date of the filing of a chattel mortgage on a motor vehicle on the certificate of title to such vehicle to a later date, or, at a later date, to endorse such filing date of such a mortgage on such certificate of title to such vehicle to conform to and appear to have been made at the original date of filing entered upon the chattel mortgage.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office that a Recorder of Deeds in this State has no authority to defer to a date later than the date of the filing of the mortgage on a motor vehicle, the endorsement on a certificate of title to such motor vehicle the date of the filing of such mortgage on such motor vehicle, or at any later date to make such endorsement on such certificate of title to conform to and make it appear to be the same filing date as was originally placed on such chattel mortgage.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON
Attorney General

GWC:irk

SPECIAL ROAD DISTRICTS: (1)
TOWNSHIP ORGANIZATION:

Special road districts in county under township organization may be formed under the provisions of Secs. 233.320-233.445, RSMo 1949.
(2) Duties of county court in such county with respect to petition for formation of such special road district.



May 26, 1955

Honorable Jimmie B. Trammell
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I have been instructed by the County Court of Stoddard County, Missouri, to request an opinion from your office on the following questions, to-wit:

"1. In a County operating under Township form of organization in which the townships have been organized into General Road Districts, may such General Road Districts be divided into Special Road Districts under the provisions of Chapter 233, V.A.M.S., 1949, or may a Special Road District be set up within said General Road District?

"2. If the answer to the above question is in the affirmative, then does the County Court have any discretion in the formation of a Special Road District when a Petition for its formation is filed with the County Court, signed by a majority of the resident landowners within said proposed Special Road District, owning more than half the acreage within said proposed Special Road District, and may the County Court consider any remonstrance other than that signed by resident landowners within the proposed Special Road District?

"This problem arose in the County Court of

Honorable Jimmie B. Trammell

Stoddard County when a Petition was filed in said Court for the formation of a Special Road District comprised of parts of Castor and New Lisbon Townships of Stoddard County, which are now General Road Districts and more than 300 residents of said Townships filed remonstrances with the County Court, stating that the formation of this Special Road District within said General Road Districts would so curtail their revenue that they could no longer function as General Road Districts.

"We would appreciate a prompt reply, as the County Court must render their decision on this matter in the near future."

A complete scheme for the formation of special road districts and for benefit assessments in connection therewith in counties operating under township organization form of government has been provided under the provisions of Sections 233.320 to 233.445, RSMo 1949. In your opinion request you refer to "General Road Districts" as having been formed in the various townships of the county. Such action has no doubt been taken by the respective township boards of directors pursuant to the authorization contained in Section 231.160, RSMo 1949, reading in part as follows:

"The township board of directors shall form the township into one or more road districts.
* * * * *

We have carefully examined all of the statutes relating to the formation of special road districts in counties under township organization and find nothing contained therein precluding the formation of such special road districts to include areas now forming all or parts of general road districts created under the provisions of Section 231.160, RSMo 1949, quoted supra. We, therefore, are persuaded to the belief that such special road districts may lawfully be formed upon compliance with statutory requirements. Judicial sanction of such action appears by inference in the following statement appearing in State ex rel. Moore v. Wabash R. Co., reported 208 S.W.2d 223, from which we quote, 1.c. 226:

"Upon a complete examination of the constitutional sections and of the statutes

Honorable Jimmie B. Trammell

enacted pursuant thereto beginning in 1909, it appears there is nothing in any language used, any procedure prescribed or any purpose indicated which points to any different intended use of the words 'road district,' than that in which they are commonly understood and accepted. Certainly the words are not synonymous with township. There may be a number of general road districts within a township. A special road district would conceivably embrace much more than an entire township. * * * * * (Emphasis ours)

It is our thought that your second question is answered by a previous official opinion of this department delivered under date of July 17, 1951, to the Honorable Don Kennedy, Prosecuting Attorney, Vernon County. A copy of such opinion is enclosed herewith.

CONCLUSION

In the premises we are of the opinion:

1. That special road districts may be created in counties operating under the township form of government upon compliance with the provisions of Section 233.320-233.445, RSMo 1949, and that such newly formed special road districts may consist of all or portions of one or more general road districts previously organized;
2. That the county court can in its discretion deny a petition for incorporation of a special road district even though such petition is in proper form and contains the requisite number of signatures if remonstrances are filed; and
3. That remonstrances must be signed by resident landowners living within the proposed new special road districts.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

WFB:DA

Very truly yours,

Enclosure

JOHN M. DALTON
Attorney General

COUNTIES:
COUNTY COURTS:
REVENUE BONDS:
HOSPITALS:
COUNTY HOSPITALS:

Money derived from the sale of bonds authorized by a special election must be used for the specific purpose stated on the ballot and for no other.

FILED

November 17, 1955

Honorable Jimmie B. Trammell
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

Your letter of November 12, 1955, requesting an opinion of this office, reads, in part, as follows:

"I would like to request an opinion from your office concerning the status of bond money voted for the purpose of building a community hospital. I wrote your office earlier this month concerning this matter, but apparently did not arrive for some reason.

"Stoddard County is now discussing the proposition of voting on bonds to build a community hospital and the question came up as to whether this money could be touched by anyone holding outstanding obligations of the County, or whether it could be used only for the purpose of building a hospital."

At the outset, Section 205.160, RSMo 1949, authorizing the establishment of county hospitals by the issuance of bonds, should be noted:

"The county courts of the several counties of this state are hereby authorized, as provided in sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties."

Honorable Jimmie B. Trammell

The "general law" in regard to county indebtedness is in turn governed by Article VI, Section 29, Missouri Constitution, 1945, which provides:

"The moneys arising from any loan, debt, or liability contracted by the state, or any county, city, or other political subdivision, shall be applied to the purposes for which they were obtained, or to the repayment of such debt of liability, and not otherwise."

Chapter 108, RSMo 1949, contains numerous provisions clarifying this constitutional requirement that the money authorized by a bond election be applied only to the purpose for which it was voted.

Section 108.110. "The moneys derived from the sale of such bonds shall be deposited in the county treasury, and the county clerk shall charge the treasurer therewith. And the said moneys shall be drawn from the treasury upon the order of the court for the purposes for which the bonds were issued."

Section 108.180. "When any bonds shall have been issued by any county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, as provided under the constitution and laws of this state for the incurring of indebtedness, or for refunding, extending, unifying the whole or any part of their valid bonded indebtedness, the proceeds from the sale thereof and all moneys derived by tax levy, or otherwise, for interest and sinking fund provided for the payment of such bonds, shall be kept separate and apart from all other funds of such governmental unit, so that there shall be no commingling of such funds with any other funds of such county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, provided, that in no case shall the proceeds derived from the

Honorable Jimmie B. Trammell

sale of any such bonds be used for any purpose other than that for which such bonds were issued, nor shall such interest and sinking fund be used for any purpose other than to meet the interest and principal of such bonds; provided further, that any bonds or money remaining in the interest and sinking fund of any such county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, after the extinction of the indebtedness for which such bonds were issued, shall be paid into the general revenue fund of such county, city, incorporated town or village, or other political corporation or subdivision, and into the building fund of such school district."

Section 108.190. "The county court or the governing authorities of any city, incorporated town or village, school district, or other political corporation or subdivision of the state, or any comptroller, collector or treasurer of any such county, city, incorporated town or village, or other political corporation or subdivision of the state, who shall fail to carry out the provisions of section 108.180, or violate any of the provisions thereof, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars or by imprisonment in the county jail not to exceed one year, or by both such fine and imprisonment."

Section 108.230. "All money collected and all securities purchased or held belonging to the interest and sinking fund of any county, city, incorporated town or village, school district, or other political corporation or subdivision of the state, shall be exempt from attachment and execution. Such money and securities shall be exempt from being levied upon, taken, sequestered, or applied toward paying the debts of any such county, city, incorporated

Honorable Jimmie B. Trammell

town or village, school district, or other political corporation or subdivision of the state, other than for payment of the indebtedness for which such funds and securities were provided. The money and securities so held shall be deemed to be an inviolable sinking fund for the purpose of extinguishing the indebtedness for which such fund had been levied and collected."

Moreover, numerous Missouri cases have emphasized the fact that the county is, in effect, the custodian of trust funds. In *Stephens v. Bragg City*, 224 Mo. App. 469, 27 S.W. 2d 1063, at page 1064, the court stated:

"* * *This money did not belong to the general revenue fund of the city. It was the product of bonds voted by the people of the city to secure money for a specific purpose, and when the bonds were issued and sold the money received thereby could not legally be used by the city for any other purpose. The city authorities had no power under the law to transfer this money to the general revenue fund of the city and use it to pay ordinary debts of the city.* * *"

See, in addition, *Thompson v. St. Louis*, Mo. Sup., 253 S.W. 2d 969, *Meyers v. Kansas City*, 323 Mo. 200, 18 S.W. 2d 900, *City of St. Louis v. Senter Commission Co.*, 337 Mo. 238, 85 S.W. 2d 21.

CONCLUSION

It is, therefore, the opinion of this office that the money derived from the sale of bonds authorized by a special election must be used for the specific purpose stated on the ballot and for no other.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walker La Brunerie, Jr.

Very truly yours,

John M. Dalton
Attorney General

WLaB:hw

COUNTY HEALTH CENTER: : 1) Senate Bill No. 286 requires a reduction
 RATES OF LEVY: : in the rate of levy for county health
 TAXATION: : center purposes and such rate is to be
 LEVIES: : reduced by the county court. 2) Only
 : public schools and libraries are
 : specifically given exception from the
 : operation of Senate Bill No. 286, in
 : regard to participation in state funds.
 : 3) In years when Senate Bill No. 286
 : is not applicable, the originally
 : authorized rate goes again into effect.
 :



August 15, 1955

Honorable James A. Vickrey
 Prosecuting Attorney
 Pemiscot County
 Caruthersville, Missouri

Dear Mr. Vickrey:

This department is in receipt of your request for a legal opinion, which request reads as follows:

"The Trustees of the Pemiscot County Health Center together with our county health officer have requested me to inquire as to your opinion concerning the practical effect the enactment of Senate Bill No. 286 will have on county health centers now collecting the one mill tax authorized by the voters pursuant to section 205.010 R.S. Mo., 1949. A copy of Senate Bill No. 286 and section 205.010 are attached hereto. Attention is also invited to a copy of the letter of Mr. J. Rex James, Administrator of the Division of Health, attached hereto which sets out the policy under which county health centers receive state aid.

"We are concerned over whether or not the Senate Bill referred to requires a reduction in the one mill tax rate voted in by the people under section 205.010, and if so, to what extent. The Senate Bill provides in part that '... Where the taxing authority is a school district it shall only be required hereby to revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in

Honorable James A. Vickrey:

the apportionment of state school moneys due to its increased valuation.' If the above underlined portion of the Act does not also apply to health centers (assuming a reduction in tax rate authorized by section 205.010 is required), the effect will be a substantial reduction of funds available to health centers, since the increase in assessed valuation also reduces the amount of state aid available to county health centers. We further wonder if we are correct in our understanding that (regardless of the effect on revenue for the current year) in subsequent years the Senate Bill will have no effect on the one mill tax rate -- that we can continue to, or go back to, collecting it; because, it seems there are two conditions precedent to bringing the Senate Bill in operation for any year, i.e. (1) 'Whenever the assessed valuation .. has been increased by ten per cent or more over the prior year's valuation, either by order of the state tax commission or by other action, and (2) such increase is made after the rate of levy has been determined and levied by the county court, etc.'

"Therefore, your opinion is respectfully requested on the following specific questions:

"1. In a county where, pursuant to sections 205.010 and 205.020, Revised Statutes of Missouri, 1949, an annual tax in the amount of ten cents on each one hundred dollars of the assessed valuation of property has been duly levied for the establishment, maintenance, management and operation of a county health center, and in which county the assessed valuation of property has been subsequently increased in excess of ten per cent of the prior year's valuation by the state tax commission, does Senate Bill No. 286, enacted by the 68th General Assembly, require or authorize a reduction in said rate of levy for county health purposes?

Honorable James A. Vickrey:

"2. If the question above stated is to be answered in the affirmative, then to what extent must the rate of levy be reduced?-- (to the extent necessary to produce substantially the same amount of taxes as previously estimated to be produced by the original levy or to such extent plus such additional amounts as may be necessary approximately to offset the health center's reduction in the apportionment of State Division of Health money due to increased valuation?)

"3. What effect, if any, will Senate Bill No. 286 have on the collection of the full one mill tax in subsequent years, if there is no further increase in the assessed valuation of property by 'the state tax commission or by other action?'

"While the true legislative intent does not appear to be expressed in the Senate Bill referred to, the wording of it, has caused serious alarm in this county as to whether or not the Act will be construed in a manner that will very seriously hamper a health center that is only now barely existing yet rendering an indispensable public service."

1) The attached opinion written to the Honorable W.H.S.O'Brien, Prosecuting Attorney, Jefferson County on August 15, 1955, answers your first question. In short, Senate Bill No. 286 does require a reduction in the rate of levy for county health center purposes and such rate is to be reduced by the county court.

2) The law clearly stipulates that the rate of levy will be lowered "to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy." The only exceptions are public schools and libraries whose levies are not to be "reduced, below a point that would entitle them to participate in state funds."

3) You ask next: If there is no further increase in the assessed valuation in subsequent years, may the levy

Honorable James A. Vickrey:

return to the original rate set in the county health center election. When Senate Bill No. 286 is not applicable, the originally authorized rate must again come into operation.

CONCLUSION

It is the opinion of this department that:

- 1) Senate Bill No. 286 requires a reduction in the rate of levy for county health center purposes and such rate is to be reduced by the county court.
- 2) Only public schools and libraries are specifically given an exception from the operation of Senate Bill No. 286 in regard to participation in state funds.
- 3) In any year Senate Bill No. 286 is not applicable to a particular county the rate set by the voters comes again into operation.

Yours very truly,

JOHN M. DALTON
Attorney General

WLaB:irk

Enc.(1)

COUNTY BOARD OF ZONING ADJUSTMENT: In deciding contested cases the board of zoning adjustment in first class counties must make findings of fact and conclusions of law.

FIRST CLASS COUNTY:



January 27, 1955

Mr. Louis Wagner
Assistant County Counselor
Suite 202 Courthouse
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"Kindly advise whether the County Court or the Board of Zoning Adjustment, in determining zoning matters under Chapter 64 R.S. Mo. 1949, are subject to the Administrative Procedure Act, in that Findings of Fact and Conclusions of Law must be made in any contested case..

"Your prompt attention to this matter will be greatly appreciated."

Section 64.120, Missouri Revised Statutes of 1949, provides that any county court in class one counties which has appointed a planning commission, shall also create a county board of zoning adjustment.

This board functions in case of appeal taken from the decision of the administrative officer in administering a county order. Said board is vested with almost unlimited authority to hear such appeal, modify or affirm such orders. Such board is definitely a fact-finding body and said statute further provides that an appeal may be granted from its decision to the circuit court.

You inquire if said board in determining such matters under its jurisdiction, under Chapter 64, is subject to the Administrative

Mr. Louis Wagner

Procedure Act in that findings of fact and conclusions of law must be made in contested cases.

Section 536.100, Vernon's Annotated Missouri Statutes, excepts from the provisions of said Administrative Procedure and Review Act any final decision in a contested case wherein there is some other provision for judicial review provided by law.

Under Section 22, Article V, Constitution of Missouri, 1945, it specifically provides that all final decisions, findings, rules and orders of any administrative official or body existing under the Constitution or law of this state which are judicial or quasi-judicial and affect private rights shall be subject to review by the courts as provided by law.

In Re City of Kinloch, 242 S.W.(2d) 59, l.c. 63, a decision relative to power of county courts, the court held that while such actions by administrative quasi-judicial bodies, in hearing and determining facts imposed upon them by statute, does not necessarily confer judicial power in a constitutional sense, they are actions judicial in nature.

Chapter 536, Vernon's Annotated Missouri Statutes, is an attempt by the legislature to implement said constitutional provision and is referred to as the Administrative Procedure and Review Act. Section 536.010 of said Act defines agency and contested cases for the purpose of said chapter and reads:

"For the purpose of this chapter

"(1) 'Agency' means any administrative officer or body existing under the constitution or by law and authorized by law to make rules or to adjudicate contested cases;

"(2) 'Rule' includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the legal rights or privileges of, or procedures available to the public;

Mr. Louis Wagner

"(3) 'Contested case' means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by statute to be determined after hearing."

There are numerous agencies of the state that the courts have held to be subject to said Act. Such was held in State ex rel. Dail v. Public Service Commission, 203 S.W.(2d) 491, 240 Mo. App. 250.

In Scott v. Wheelock Bros. 209 S.W.(2d) 149, 357 Mo. 480, the opinion therein tends to hold that the Administrative Procedure and Review Act was not applicable to appeals from the circuit court judgment, affirming the award in compensation proceedings, as there are applicable proceedings under the Workmen's Compensation Act. However, the concurring opinion by Judge Hyde very clearly makes what he designates a necessary clarifying statement, as to the applicability of the Administrative Procedure Act and held that clearly the first nine sections of said Act apply to all agencies.

If this be the law then definitely such board must make findings of fact and conclusions of law as is provided in Section 536.090, Vernon's Annotated Missouri Statutes, which reads:

"1. Every decision and order in a contested case shall be in writing, and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

"2. Immediately upon deciding any contested case the agency shall give written notice of its decision by delivering or mailing such notice to each party, or his attorney of record, and shall upon request furnish him with a copy of the decision, order, and findings of fact and conclusions of law."

CONCLUSION

It is the opinion of this department that the county board of

Mr. Louis Wagner

zoning adjustment of a first class county must in passing upon matters presented for its determination make findings of fact and conclusions of law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

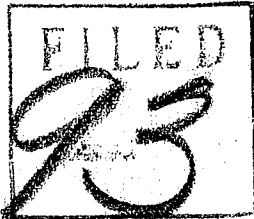
Yours very truly,

JOHN M. DALTON
Attorney General

ARH:vlw:mw

TAXATION: Sales tax on cigarettes contemplated by H.B. No. 18 is not unconstitutional as amounting to "double taxation."

February 17, 1955



Honorable J. S. Wallace
Member, Missouri House of Representatives
Scott County
House of Legislative Post Office
Capitol Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I would like to have your opinion as quickly as possible as to the constitutionality on double taxation or otherwise with regard to House Bill No. 18.

"I would appreciate it very much if you can get this opinion to me, as this bill is on the calendar now for hearing."

At the outset, we wish to point out that the Constitution of Missouri contains no direct prohibition against so-called "double taxation." The general rule with regard thereto is found in *State v. Hallenberg-Wagner Motor Co.*, reported, 108 S. W. (2d) 398, from which we quote, l. c. 402:

"* * Respondent's assault against the foregoing construction on the stated ground it results in double taxation confuses, we think, non-uniformity in taxation with double taxation. Respondent refers us to no constitutional prohibition against double taxation, and the cases relied upon, *Automobile Gas Co. v. St. Louis*, 326 Mo. 435, 443, 32 S. W. (2d) 281, 283 (3); *State ex rel. v. Louisiana & M.R.R.Co.*, 196 Mo. 523, 535, 94 S. W. 279, 281; and *State ex*

Honorable J. S. Wallace

rel. v. Koeln, 278 Mo. 28, 39, 211 S. W. 31, 34, are only to the effect that double taxation is not favored and is not to be presumed; illegal double taxation occurring when a given subject of taxation contributes twice to the same burden while other subjects of the same class are required to contribute but once. See, generally, Cooley, on Taxation (4th Ed.) Sections 1684 and 223-246; 61 C. J. pp. 137-147, Sections 69-86; 37 C. J. pp. 209-211, Sections 62-64. * * *

It is true that the proposed bill does not exempt sales of cigarettes from the general sales tax law found Chapter 144, RSMo 1949. We do not believe that such results in a lack of uniformity in the application of the proposed new tax, however, for the reason that cigarettes constitute a peculiar and particular class of their own. In other words, constituting a separate and distinct class as they do, cigarettes may be isolated and singled out for the imposition of a tax on the sales thereof without infringing upon constitutional prohibitions against lack of uniformity or discrimination in the levying of such tax.

This phase of the problem has been considered by the Supreme Court in Ploch v. City of St. Louis et al., reported 138 S. W. (2d) 1020, from which we quote, l. c. 1023:

"Plaintiff contends that the ordinance violates Sec. 53, Sub-Sec. 32, Art. IV of the constitution, Mo. St. Ann., which provides that 'where a general law can be made applicable, no local or special law shall be enacted.' He argues that the isolation of cigarettes from other merchandise, including other forms of tobacco, for the purpose of taxing and regulating the sale of the same, is an arbitrary and unreasonable classification.

"In all jurisdictions the cigarette has been a favored article for isolation and classification. The sale or gift of a cigarette is prohibited in some jurisdictions. It is not a 'useful commodity'. The nicotine is harmful. There is no question of classification. The harmful

Honorable J. S. Wallace

properties of the article do the classifying. * * * *

"Furthermore, it is common knowledge that the size and mildness of the cigarette tempt the young to indulgences which produce tobacco addicts. This justifies the isolation of cigarettes from other forms of tobacco. In some jurisdictions the sale of cigarettes is prohibited within certain distances of school houses. The taxation and regulation of the article is well illustrated in 62 A. L. R. 105. The ordinance is not a purely revenue measure, for the tax levied is such that it tends to diminish the use of the article. An occupation tax may be both a police regulation and a revenue measure. *Viquesney v. Kansas City*, 305 Mo. 488, 497, 266 S. W. 700; *Gundling v. Chicago*, 177 U. S. 183, 188, 20 S. Ct. 633, 44 L. Ed. 725. The classification is neither arbitrary nor unreasonable, the ordinance levies an occupation tax, and it does not violate the above-named section of the constitution."

The salutary effect of additional taxation on cigarettes as tending to diminish the consumption thereof is in accord with the emphasized portion of the opinion quoted.

CONCLUSION

In the premises, we are of the opinion that the tax on sales of cigarettes proposed under H. B. No. 18 is not unconstitutional as amounting to "double taxation."

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General

WFB, Jr.:da

SCHOOLS: Requirement of separate polling place
SCHOOL DISTRICTS: in each incorporated city or town in
ELECTIONS: school district mandatory before election.



March 24, 1955

Honorable Wayne W. Waldo
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Mr. Waldo:

This is in response to your request for an opinion dated March 15, 1955, which reads as follows:

"The opinion of the Attorney General is respectfully requested on the following situation:

Waynesville Reorganized School District R-4 is a school district in Pulaski County, Missouri. Pulaski County, Missouri is a county of the 4th Class. The City of Waynesville, Missouri is a city of the 4th Class and it is located in said school district. In November of 1954, St. Robert, Missouri was incorporated as a city of the 4th Class. It borders the City of Waynesville, Missouri and St. Robert is also located within Waynesville Reorganized School District R-4. Both the City of Waynesville and the City of St. Robert have less than 2,000 inhabitants, according to the 1950 Census.

Section 165.330, Missouri Revised Statutes 1949 provides 'That if there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town.' Under Section 165.330, R.S. Mo. 1949, is the

Honorable Wayne W. Waldo:

Board of Directors of the Waynesville School District required to provide a polling place within the City of St. Robert, Missouri? In other words, is the above quoted Section mandatory or merely directory? In this respect the attention of the Attorney General is called to the Case of State v. Brown, 33 S.W. (2d) 104, 1.c. 107, and State v. Schade, 167 S.W. (2d) 135, 1.c. 141.

"It is requested that this opinion be expedited as much as possible so that the Board of Directors can prepare for the election on April 5, 1955."

The section of the statutes referred to in your opinion request, Section 165.330, MoRS, Cum. Supp. 1953, reads, in part, as follows:

"1. The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, * * *

* * * * *

"3. * * * provided, that if there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town and said school election shall be conducted within the limits of such other incorporated city or town in the same manner as hereinbefore provided for cities or towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants."

We have examined the cases which you cited in your opinion request, but do not find them determinative of the question. In addition to the cases cited there are

Honorable Wayne W. Waldo:

many others to be found in the Missouri Digest, under Key No. 227, dealing with the question of whether a statute is to be construed as mandatory or directory. All of the ones we have noted, however, with regard to elections consider the question after the election has occurred. In this instance, however, we are examining the problem before the election is held.

In 20 C.J., Elections, Section 88, page 103, it is said:

"* * * While in some, but not in other, jurisdictions the statutes in terms make it the plain duty of the proper authorities to locate a polling place within the election district or precinct, yet there is vast difference between compelling a performance of this duty by judicial process and rejecting the returns of the precinct because of an irregularity in locating the polling place outside the precinct, * * *"

This same distinction was recognized in *Armantrout v. Ebon*, 349 Mo. 667, 162 S.W. (2d) 867, 1.c. 871, where the court said:

"As the appellant suggests, 'elections should be so held as to afford a free and fair expression of the popular will.' State ex inf. *McKittrick v. Stoner*, 347 Mo. 242, 146 S.W. 2d 891, 894. But 'elections are not lightly set aside' and there is a vast difference in passing on the rules and regulations regarding the conduct of an election before the election is held and after. 29 C.J.S., Elections, Sec. 249, p. 360; 18 Am. Jur., Sec. 206, p. 319. * * *"

In terms, the above-quoted proviso of Section 165.330, supra, places the clear duty upon the board of education to

Honorable Wayne W. Waldo:

establish a polling place in each incorporated city or town in the school district. There is a valid reason for such requirement. The basic principle to be observed in the conduct of elections is to provide a free and fair expression of the popular will. We cite herewith the case of *Bowers v. Smith*, 111 Mo. 45, 1.c. 86, not as authority for our position herein but because it expresses the reason for establishing multiple polling places. In the dissenting opinion Gantt, J., made the following statement:

"* * * Observation and experience have taught that one of the greatest evils attending our popular elections has been the crowding of the polls. In this way the not over-scrupulous partisan manages to delay voters, deter the timid and diffident voter, annoy the judges with frequent and unfounded challenges and other interruptions, and block the way for all but his own party. * * *"

To avoid this overcrowding seems to be the basic purpose for the requirement in Section 165.330 that a polling place be established in each incorporated city or town in a school district.

We do not rule herein as to what the result might be if this election is conducted without having provided a polling place in St. Robert because that might well depend upon many additional factors which would affect a decision as to the validity of the election. Viewing the matter as we are before the election is held, we are of the opinion that, since Section 165.330, supra, requires a separate polling place in each incorporated city or town in the school district, the board of education could be forced to designate a polling place in St. Robert by writ of mandamus and that in that sense the proviso of Section 165.330 is mandatory.

CONCLUSION

It is the opinion of this office that the proviso of Section 165.330, MoRS, Cum. Supp. 1953, requiring a polling

Honorable Wayne W. Waldo:

place in each incorporated city or town in a school district is mandatory in the sense that the board of education could be required by a writ of mandamus to designate a polling place in such city or town before the election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

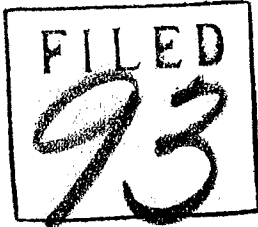
Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml:irk

STATE TAX COMMISSION:
ASSESSMENT OF PROPERTY:
INCREASE OF ASSESSMENT:

Order of the State Tax Commission increasing the assessment of property in certain counties so as to bring such assessment up to 30% of the true value does not violate the Missouri Constitution or the provisions of Section 138.390, RSMo 1949.



March 30, 1955

Honorable J. S. Wallace, Chairman
House Committee to Investigate
Raise of Assessments by the
State Tax Commission
Room 3130, State Capitol Building
Jefferson City, Missouri

Dear Mr. Wallace:

You have recently requested an opinion of this office by your letter of March 21, 1955, which reads:

"Under authority of House Resolution 70, the Speaker appointed the undersigned six members of the House of Representatives as a committee to investigate the recent actions of the Missouri State Tax Commission in raising the assessed valuations in 26 counties of the state.

"Testimony revealed that the utilities of the State of Missouri made an independent survey of the state in order to show that the assessed valuations in various counties were too low. In Mississippi County, for example, some 100 transfers were used to determine that the assessed valuations on town property should be raised 55% and farm property 50% in order that the property, both town and farm, be then assessed at 30% of true value. It was admitted that true value, as determined by the Commission, was defined as that which a willing buyer would pay a willing seller; the latter amount to be determined by the federal stamps on the warranty deeds that were checked.

Honorable J. S. Wallace, Chairman

"The investigating committee feels that an opinion of your office as to whether or not this action of the State Tax Commission is in violation of Sections 3 and 4 of Article X of the Constitution of Missouri is imperative before a report can be rendered. This opinion is needed as soon as possible."

By letter of March 24, 1955, you requested that the opinion be expanded to answer the following question:

"We would like to add to the question asked your office by my letter of March 21, 1955, the question of whether or not the actions of the State Tax Commission in raising the assessed valuation in the various counties to 30% of their true value are in violation of Section 138.390 MoRS 1949."

Section 3, Article X, Missouri Constitution of 1945, provides:

"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this Constitution, the methods of determining the value of property for taxation shall be fixed by law."

Section 4(a), (b) and (c), while having to do with the matter of taxation, and the assessment of property therefor, are not involved in the present opinion since, if the action of the State Tax Commission, to which you refer, would bring in question any constitutional provision, it would be that contained in Section 3 of Article X, supra.

It is our understanding that the State Tax Commission by its proposed order will raise the assessment in certain counties which presently have assessed their property at less than 30% of

Honorable J. S. Wallace, Chairman

its true value so that after such raise the property in such counties will be assessed at 30% of its true value. Under these circumstances it is not believed that such action by the State Tax Commission would be violative of the provisions of Section 3, Article X, Missouri Constitution of 1945. This section provides that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," commonly referred to as the "uniformity provision." The purpose of this provision is to require that property, regardless of ownership or location, will bear the same burden of tax as all other similar property wherever situated within the taxing authority. That is, that property of like kind will be taxed in the same proportion in all parts of the State where the State is the taxing authority, or in all parts of the county where the county is the taxing authority, and it would seem that the proposed action of the State Tax Commission is a step toward securing the uniformity commanded by this provision of the Constitution.

By Chapter 137, RSMo 1949, provision is set up for the State Tax Commission to act as an equalizing body on assessments within the State with the view to securing the uniformity directed by the provision of the Constitution discussed above. It is specifically provided by Section 137.115 that the assessor shall list and assess all property at "its true value in money," and it is further provided by Section 137.235 that the tax books of the various counties shall have room for the extension of assessments first, as made by the county assessor; second, as they may be changed by action of the County Board of Equalization; and, third and finally, as they may be affected by action of the State Tax Commission.

By Section 138.390 the State Tax Commission is directed between the dates of June 20 and the second Monday of July of each year "to equalize the valuation of real and tangible personal property among the several counties in the state." The Commission is directed to classify property for the purposes of taxation and to add to the valuation of each class of property for each county in which it believes the assessment to be below its real value in money, and to deduct from the valuation of each class of property in each county which it believes to be assessed above its real value in money.

As further showing the principle upon which the State Tax Commission is to function, Section 138.380 (4), RSMo 1949, directs the Commission to investigate tax laws of other states

Honorable J. S. Wallace, Chairman

and countries, and to formulate and to submit to the legislature such recommendations as the commission thinks desirable "to secure just, equal and uniform taxes." Thus, it appears from these and related statutes that the Tax Commission is to act on an over-all state level to secure uniformity in the assessment of property for the purposes of taxation amongst the several counties so that property of similar nature will bear its same proportion of the tax burden regardless of its ownership or location within the State.

It would appear to be the purpose of the State Tax Commission in the action here under consideration to effectuate the above principles.

Such action by the Tax Commission is not new to the experience of this State, and has been considered and approved by the Supreme Court in the past. Thus, in the case of Columbia Terminal Company vs. Koeln, 319 Mo. 445, 3 S.W.2d 1021, the State Tax Commission and the State Board of Equalization (which then exercised power now exercised by the State Tax Commission) raised the assessment on sub-classes 3, 4 and 10 of personal property owned by residents of the City of St. Louis by 20% so as to bring such assessment into uniformity with the assessment of similar property in other parts of the State. It was contended that such action violated the constitutional rights of certain taxpayers but the Missouri Supreme Court en banc held that such action in raising the valuation was proper. It was on other grounds that the court invalidated the tax resulting therefrom. Likewise, in State ex rel. Thompson vs. Dierckx, 321 Mo. 345, 11 S.W.2d 38, the Missouri Supreme Court en banc approved the action of the State Board in raising the assessed valuation of property of a certain class within the county and forced the county clerk by mandamus to extend the assessment as finally fixed by the State Board. The same result was again reached by the Missouri Supreme Court in First Trust Company of St. Joseph vs. Wells, 324 Mo. 306, 23 S.W.2d 108.

It is not the action of the State Tax Commission in raising the assessed valuation of all the property within a county falling in one or more classes that violates the uniformity provision of the Missouri Constitution, but, rather, it is the action of the taxing authorities which result in unequal assessment (and thus unequal distribution of the tax burden) between various items of property within the same class that violates such constitutional mandate. Thus, in the case of Jefferson City Bridge & Transit Co. vs. Blaser, 318 Mo. 373, 300 S.W. 778, the plaintiff

Honorable J. S. Wallace, Chairman

alleged that the State Tax Commission and Board of Equalization had raised the value of its property so that it was assessed the higher percentage of its true value than was other property of the same class within the State. The court stated, l.c. 785:

" * * * If the persons charged with making this assessment refused to assess plaintiff's property in proportion to its value and in uniformity with all other taxable property in the state, they are presumed to have known that such assessment would be in violation of sections 4 and 3, respectively, of article 10 of the Constitution of Missouri, and would result in unlawful discrimination against plaintiff's property. * * *"

See also Columbia Terminal Company vs. Koeln, 319 Mo. 445, 3 S.W.2d 1021, referred to, supra, wherein the Supreme Court held that the otherwise valid action of the taxing authorities was rendered unconstitutional by the fact that the increased assessment was not applied to property of the same class where such property was owned by the estates of decedents and minors. In Boonville National Bank vs. Schlottzhauer, (Mo. Sup.), 298 S.W. 732, the court very emphatically held that allegations of deliberate assessment of bank stock at 90% of its true value when all other property within the county was assessed at 75% of its true value stated a cause of action for injunction against the collection of the tax charged upon such assessment, since the patent inequality of the assessment violated the uniformity provisions of the Constitution which are now contained in Section 3, Article X.

As to the provisions of Section 138.390, RSMo 1949, it appears that the State Tax Commission has found that the valuation of property in certain counties is below its real value in money and, therefore, proposes to direct that such valuation shall be increased. This is in conformity with, rather than in violation of, the provisions of Section 138.390. It will be noted that the State Tax Commission is not at the present time taking the full step that is available to it, that of increasing the assessment to 100% of the real value in money of the property. On the contrary, it is limiting its order to directing an addition to assessments so as to raise the valuation to only 30% of the true value in money of the property involved. This is an endeavor to bring the assessment in such counties more nearly into alignment with the assessment in other counties of the State.

Honorable J. S. Wallace, Chairman

CONCLUSION

From the foregoing, it is the conclusion of this office that the proposed action of the State Tax Commission in directing an increase in the assessed valuation of property in certain counties in this State so as to bring such assessment up to 30% of the true value, is not violative of the provisions of Section 3, Article X of the Missouri Constitution of 1945 or Section 138.390, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Fred L. Howard.

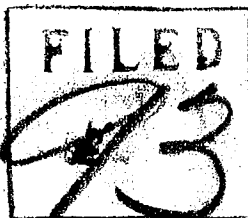
Yours very truly,

JOHN M. DALTON
Attorney General

FLH:irk/vtl

SALARIES:
OFFICERS:
CITY OF ST. LOUIS:
LIMITATIONS:
RECORDERS OF DEEDS:

The salary of the Recorder of Deeds of the City of St. Louis is fixed by the General Assembly at \$6,750 per annum, and that the present Recorder is entitled to receive that amount of salary which he should have received since taking office, except that portion due more than five years prior to institution of suit.



July 20, 1955

Honorable Eugene P. Walsh
Member, House of Representatives
706 Olive Street
St. Louis 1, Missouri

Dear Mr. Walsh:

By letter bearing date of June 4, 1955, you requested an opinion of this office on the following questions:

"1. Which of the following authorities fixes the salary of the Recorder of Deeds of the City of St. Louis; the General Assembly of Missouri or the Board of Aldermen of the City of St. Louis?

"2. If it be the General Assembly of Missouri, has it fixed the salary of the Recorder of Deeds of the City of St. Louis by Section 59.220 of the Revised Statutes of Missouri, 1949, which provides an annual salary of \$6,750.00 for recorders of first class counties?

"3. If the answer to question 2 is in the affirmative, is the Recorder of Deeds of the City of St. Louis, who has been receiving an annual salary of \$6,000.00 from the City of St. Louis since he took office January 1, 1950, entitled to be compensated by the said City for the balance of \$750.00 per year for those years since 1950, in which he has been paid but \$6000.00 per year?"

Section 59.010 RSMo 1949, creates the office of recorder of deeds in each county, and Section 59.220 sets the salary of recorders of deeds in counties of the first class at \$6,750 per annum.

Honorable Eugene P. Walsh

Art. VI, Section 11, Constitution of Missouri, 1945, makes the following requirement:

"Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall be prescribed by law uniform in operation in each class of counties.* * *"

The City of St. Louis has been given constitutional recognition as both a city and county by Art. VI, Section 31, Constitution of Mo., 1945, that section reads:

"The city of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with the provisions of this Constitution. As a city it shall continue for city purposes with its present charter, subject to changes and amendments provided by the Constitution or by law, and with the powers, organization, rights and privileges permitted by this Constitution or by law."

The legislature has by Section 48.020, RSMo 1949, established four classes of counties. That section reads:

"All counties of this state are hereby classified, for the purpose of establishing organization and powers in accordance with the provisions of section 8, article VI, Constitution of Missouri, into four classes as follows:

"Class 1. All counties now having or which may hereafter have an assessed valuation of three hundred million dollars and over shall be in the first class."

The City of St. Louis having an assessed valuation in excess of three hundred million dollars (approximately 1½ billion dollars in 1954), is therefore a county of the first class.

From the above it appears that the City of St. Louis has the dual status of a county and a city. Since the recorder of deeds is a county officer it is our conclusion that his salary may be fixed by the General Assembly, and has been so fixed at \$6,750 per annum by Section 59.220. Our conclusion is substantiated by State ex rel. Dwyer v. Nolte, 351 Mo. 271, 172 S.W.2d, 854. In that case the

Honorable Eugene P. Walsh

treasurer of the City of St. Louis brought a proceeding in mandamus to get his salary at the amount set by a statute, which was \$8,000 per annum. The city charter and a city ordinance set the treasurer's salary at \$5,000 per annum. The trial court found that the treasurer was entitled to receive the annual salary of \$8,000 and to recover back pay on that basis. The Supreme Court affirmed the judgment, saying, l.c. 856:

"That part of the charter fixing the treasurer's salary is void."

Having determined that the Recorder of Deeds is entitled to receive the annual salary of \$6,750, we turn to your question of whether he may recover the difference between the amount of salary he has received since taking office and the amount he should have received. State ex rel. Dwyer v. Nolte, supra, is sufficient authority for our holding that the Recorder may recover his unpaid salary. It is well settled law that the salary of a public officer belongs to him as an incident to his office, and when the salary is improperly withheld, he may sue for and recover it. Bates v. City of St. Louis, 153 Mo. 18, 54 S.W. 439; State ex rel. Nicolai v. Nolte, 352 Mo. 1069, 180 S.W. 2d 740.

However, the five year statute of limitations provided by Section 516.120 RSMo 1949, is available as a defense in a suit brought to collect unpaid salary which was due more than five years before bringing suit. See Gill v. Buchanan County, 346 Mo. 599, 142 S.W.2d 665; Coleman v. Kansas City, 351 Mo. 254, 173 S.W. 2d 572; Coleman v. Kansas City, 353 Mo. 150, 182 S.W. 2d. 74.

CONCLUSION

It is, therefore, the opinion of this office that the salary of the Recorder of Deeds of the City of St. Louis is fixed by the General Assembly at \$6,750 per annum, and that the present Recorder is entitled to receive that amount of salary which he should have received since taking office, except that portion due more than five years prior to institution of suit.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

PMcG:gmtld

MOTOR VEHICLES: A person under twenty-one years of age operating a school
HIGHWAY PATROL: bus transporting ten or less pupils is required to have
SCHOOL BUS: a chauffeur's license unless said school bus is owned by
U. S., State of Missouri, Municipality or political Sub-
division of the State, which includes school district, in such case the
operator need only have an operator's license. If said school bus trans-
ports more than ten pupils regardless of ownership, if the operator is
under 21 years of age, he is required to have a chauffeur's license. A
person 18 years of age duly licensed as a chauffeur may operate a school
bus regardless of the number of pupils carried.

October 10, 1955

93
FILED

Colonel Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel Waggoner:

This will acknowledge receipt of your request for an opinion
which reads:

"We have several questions regarding Section
302.051 as re-enacted by Senate Bill No. 85;
Section 302.070 as re-enacted by Senate Bill
No. 251; and the definition of "chauffeur"
in Section 302.010 as re-enacted by Senate
Bill No. 251 which bills were passed by the
68th General Assembly and which become ef-
fective August 29, 1955. The questions are
as follows:

- (1) Is a person, under the age of
21 years, required to have a chauf-
feur's license if operating a school
bus transporting less than 10 pupils?
If the bus transports more than 10
pupils?
- (2) May a person who is 18 years of
age and properly licensed as a chauf-
feur operate a school bus regardless
of the number of pupils transported?

It is respectfully requested that you furnish
us with an official opinion to the questions
listed above."

Colonel Hugh H. Waggoner

Senate Bill 251 and Senate Bill 85 referred to hereinabove both were truly agreed to and finally passed by the 68th General Assembly of the State of Missouri. Neither bill carried an emergency clause, therefore, both became effective on August 29, 1955.

Senate Bill 251, repealed Section 302.070, RSMo 1953 Cum. Supp., and re-enacted in lieu thereof a new section known by the same number which reads:

"No person who is under the age of twenty-one years shall drive any motor vehicle while in use as a school bus or public or common carrier of persons or property until he has been licensed as a chauffeur, except that drivers of trucks of less than one ton manufacturer's rated capacity may be licensed as a chauffeur if at least eighteen years of age."

Section 302.070 RSMo. 1953 Cum. Supp., contained an exception therein not found in Section 302.070, Senate Bill 251, relative to drivers of school busses, and provided that if not more than 10 pupils were riding in the bus then the age of the driver shall be not less than 16 years.

Under Senate Bill 85, Section 302.051, RSMo 1953, Cum. Supp., was repealed and a new section known by the same number was enacted in lieu thereof and reads:

"Any person holding a valid operator's license shall not be required to procure a chauffeur's license for the operation for official use of any motor vehicle owned by the United States, the state of Missouri, or by any municipality or political subdivision of this state, except that any person operating a school bus carrying more than ten pupils, shall be required to procure a chauffeur's license."

The foregoing statute makes an exception that was not contained in the former statute repealed, relative to operators of school busses, and that is that any person operating a school bus carrying more than 10 pupils shall not be required to procure a chauffeur's license.

Colonel Hugh H. Waggoner

A primary rule for construction of statutes is to ascertain the lawmaker's intent from the words used, if possible, and give the language thereof, honestly and faithfully, its plain rational meaning and promote its objects. State ex rel. Jack Frost Abbotoirs Inc. v. Steinbach, 274 S.W. (2d) 588.

While there is apparently some conflict in the foregoing statutes, we believe that these two statutes can be construed together so as to give meaning to all provisions thereof.

It has been held by the appellate courts of this state that a school district is a political subdivision of the state. In ex. inf. v. Whittle 63 S.W. (2d) 100 l.c. 102, the court said:

"Respondent next contends that a school district is not a political subdivision of the State. The authorities are to the contrary."

Section 302.051, Senate Bill 85, supra, is in the nature of a special statute as it applies to person only operating motor vehicle owned by the United States, State of Missouri, and by any municipality or political subdivision of the state and Section 302.070, Senate Bill 251, supra, is in the nature of a general statute applicable to operation of all motor vehicles used as school busses or public or common carriers.

Therefore, applying another well established rule of statutory construction, that where two statutes are passed at the same session of the Legislature, taking effect at the same time and relating to the same subject matter, one dealing with the subject in general in comprehensive terms and another dealing with the part of the same subject in a more minute and definite way, the two should be read together and harmonized, with a view of giving effect to a consistent legislative policy, but to the extent of any necessary repugnancy between them, the special statute will prevail over the general statute. (State ex. rel. Moirer v. Crawford, 262 S.W. (2d) 341, 303 Mo. 652 and Dalton v. Fabius River Drainage Dist. 219 S.W. (2d) 289, State v. Harris, 87 S.W. (2d) 1026, 337 Mo. 1052.), we believe it was the legislative intent in enacting the foregoing statutes under Senate Bill 285 and 271 respectively, that duly licensed operators of motor vehicles owned by the United States, the State of Missouri, or by any municipality or political subdivision of the state, which includes school districts, carrying ten or less

Colonel Hugh H. Waggoner

pupils are not required to obtain a chauffeur's license prior to operating said motor vehicles. Furthermore, that any person under 21 operating school busses carrying more than ten pupils are required to be licensed as a chauffeur.

CONCLUSION

It is the opinion of this department that a person under the age of 21 years is required to have a chauffeur's license if operating a school bus transporting ten or less pupils, unless said school bus is owned by the United States, State of Missouri, municipality or political subdivision of the state, which includes a school district, in such case the operator of such school bus need only have an operator's license. If said school bus transports more than ten pupils regardless of ownership, the operator being under 21 years of age is required to have a chauffeur's license. Furthermore, it is the opinion of this department that a person 18 years of age and duly licensed as a chauffeur, may operate a school bus regardless of the number of pupils transported.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

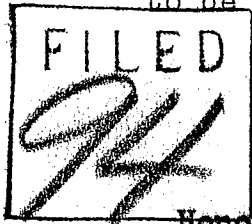
Yours very truly,

John M. Dalton
Attorney General

ARH:bl:dld

INTOXICATING LIQUOR:
NONINTOXICATING BEER:
ADVERTISING:

There is no legal prohibition against a manufacturer making and leasing to any store licensed to sell intoxicating liquor or nonintoxicating beer, a metal beverage cooler containing a metal superstructure upon which will be colored pictures of the products contained in the cooler, such as milk, soft drinks, intoxicating liquor or nonintoxicating beer, from which the customer may help himself, such intoxicating liquor or nonintoxicating beer not to be consumed on the premises.



January 5, 1955

Honorable James Webbe
Senator, Fourth District
2345 Lafayette Avenue
St. Louis 1, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I would like to inquire whether the following setup is in violation of any law of the state of Missouri, and more particularly the liquor law.

"Would it be legal for a manufacturer to make and then lease to any store licensed to sell beer and/or hard liquor, a metal beverage cooler such as is pictured on the attached advertisement, to which will be added a metal superstructure upon which there will be colored pictures of the products contained on the cooler, such as milk, soft drinks, beer, or any product which the store renting the cooler wants to put in it.

"Customers may serve themselves to the packaged beer, which, of course, would not be consumed on the premises."

Since you do not so state, we assume that no distiller, wholesaler, brewer, or any other of the classes of persons enumerated in Section (a) of Regulation No. 4 of the Rules and Regulations of the Department of Liquor Control, has any financial interest in the establishment which would manufacture these metal beverage coolers, so that there would be no possibility of any violation of Regulation No. 4, which prohibits any person or persons so associated, as set forth above, from having any financial interest in any retail establishment selling intoxicating liquor or nonintoxicating beer,

We wish to point out also that we have, for the purposes of this opinion, assumed that the rental cost of the cooler is to be

Honorable James Webbe

paid entirely by the retail licensee and that no part thereof is to be supplied directly or indirectly by any distiller, wholesaler or brewer. If this assumption is not correct then Section 311.070, RSMo 1949, and the prohibition contained therein might be involved.

We have examined Section (f) of Regulation No. 15 of the Rules and Regulations of the Department of Liquor Control, which section sets forth the kinds of advertising of intoxicating liquor and non-intoxicating beer, which are prohibited. That section reads:

"The term 'advertisement' as used herein includes any advertisement through the medium of radio, motion pictures, public address systems, newspapers or other publications or any sign or outdoor billboard or other printed or graphic matter.

"No advertising of intoxicating liquor shall contain:

- "(1) Any statement that is false or misleading in any manner.
- "(2) Any statement, design, device or representation which is obscene or indecent.
- "(3) Any statement concerning a brand of intoxicating liquor that is inconsistent with any statement on the labeling thereof.
- "(4) Any statement describing spirituous liquor to be beneficial and healthful.
- "(5) Any statement offering any coupon, premium, prize or rebate as an inducement to purchase intoxicating liquor.

"No licensee shall advertise for sale any brand of intoxicating liquor or nonintoxicating beer unless he or she has the particular brand of liquor or beer advertised in his or her licensed premises for sale.

"No licensee shall allow any sign owned by him and advertising his product to be placed or allowed to remain in or upon any building used as a dance hall, place of entertainment or restaurant, unless such building has an occupant holding a license issued by the Supervisor of Liquor Control.

"No licensee shall use any loud speaker or public address system other than regular radio advertisement, to advertise intoxicating liquors or malt beverages."

Honorable James Webbe

We do not believe that your proposed plan of operation is violative of the above.

We direct attention to Section (f) of Regulation No. 12 of the Rules and Regulations of the Department of Liquor Control, which reads:

"Window Displays.- No intoxicating liquor licensee shall display in any street window or show window any intoxicating liquor in any package, or in any bottle commonly used for intoxicating liquor or in any container bearing the manufacturer's label or brand of intoxicating liquor; nor shall any display of intoxicating liquor be arranged within such close proximity of such street window or show window as to be viewed from any sidewalk or street.

"No licensee shall display or allow to be displayed upon the windows or within the premises covered by this license where it may be visible from the exterior, any signs or markings which advertise the price of alcoholic beverages, or the size of containers, glasses or mugs in which such alcoholic beverages are offered for sale."

We assume that the display which is contemplated will be made with due reference to the above, and if it is, it will not be violative of Section (f) supra.

Your plan is clearly not violative of Section (k) of Regulation No. 13 of the Rules and Regulations of the Department of Liquor Control, which reads:

"Moving signs prohibited.- No retail licensee shall allow or cause any sign or advertisement pertaining to intoxicating liquor or malt beverages to be carried or transported upon any sidewalk or street of any municipality or upon any highway of the State."

We are unable to find any other statutes, rules or regulations applicable to your proposed plan, and since, as we stated above, we do not find any statutes or rules and regulations which might be applicable to be prohibitive, it is our belief that your plan of operation is entirely legitimate.

CONCLUSION

It is the opinion of this department that there is no legal prohibition against a manufacturer making and leasing to any store

Honorable James Webbe

licensed to sell intoxicating liquor or nonintoxicating beer, a metal beverage cooler containing a metal superstructure upon which there will be colored pictures of the products contained in the cooler, such as milk, soft drinks, intoxicating liquor or nonintoxicating beer, from which the customer may help himself, such intoxicating liquor or nonintoxicating beer not to be consumed on the premises.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

SCHOOLS: School District has not abandoned school building
TITLE: and premises so long as it continues to use same
for storage of books, desks, and property belong-
ing to the district, and other related uses.



July 6, 1955

Honorable Charles A. Weber
Prosecuting Attorney
Ste Genevieve County
Ste. Genevieve, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
opinion which reads:

"About four or five years ago Charles Rehm who was then Prosecuting Attorney of this County, wrote to your office for an opinion on a deed given to a School District with right of the grantor or his heirs to come in and take possession in the event the property was no longer used for school purposes. About 1948 the School District was reorganized and the property referred to above was no longer used by the district for the holding of classes. However, the books and desks were stored in the building, which I understand is sufficient to come within the meaning 'for school purposes'.

"The School District would like to know whether there is any length of time by which they are limited in storing the books and desks so that they would no longer come within the provisions of the deed. Would there be any possible way for the heirs to come in and take possession without the School District first removing the books and desks which are stored in the building?"

Subsequent to receiving your request you informed this department as to the exact form used in the original deed of conveyance which reads:

Honorable Charles A. Weber

"Referring to your letter of June 20th, please be advised that in a deed, dated December 24, 1888, Paul Ritter and wife, gave a deed to a certain School District, which contained the following condition, 'this deed is made on the express condition that if said land be at any time hereafter not used for school purposes, or if the school be moved to some other part of the district then in this event the above lot of ground with the building or buildings thereon shall revert and become the property of said Paul Ritter'."

We find no appellate court decision exactly in point. However, several decisions have been rendered by the appellate courts of this and other states which we believe are analogous and that if the courts were required to construe this deed, under the facts in the case, the decision would likewise hold that the keeping of the books, desks, and other paraphernalia in the old schoolhouse constitutes school purposes.

The only decision we find where the old schoolhouse was used solely for keeping books, desks, and other personal property belonging to said school district was in School District No. 24 v. Mease, 205 S. W. (2d) 146. However, in that case the directors of said school district agreed with another school district to send their pupils to the latter school district. The defendant, who was the holder of the reversionary interest, obtained the key to the old schoolhouse, removed and stored books and desks elsewhere and used the school building for the storage of tin cans used in his business. Furthermore, he plowed up the school yard, deadened trees and, in general, acted and carried on as the fee simple owner of said schoolhouse and premises.

However, the question of whether such storage of books, desks, etc., constituted school purposes was never raised in the case.

The action of the lower court was upheld in a proceeding in ejectment, holding that the appellant had no right to enter and take possession because they had not abandoned it; that the question of abandonment is not as simple as it might appear.

Honorable Charles A. Weber

In Board v. Nevada School District, 251 S. W. (2d) 1. c. 24, ejectment proceedings were instituted to recover possession of premises formerly deeded for a schoolhouse site. There was a condition in said deed that it should revert when abandoned by the directors and ceased to be used for that purpose; upon this occurring title should immediately vest in the grantors. Both the plaintiff and the defendant claimed under the deed as their common source of title.

School District 119 voted to be annexed to Nevada School District some time in October, 1949. Two days subsequent thereto the Nevada School District adopted a resolution holding that School District 119 should be continued to be operated as a school for the remainder of the term. It was practically agreed that no school was conducted on the premises from May 1, 1950 to May 10, 1951. There was some evidence that said schoolhouse had not been permanently used during this time except for certain committee or organization meetings, occasional 4-H club meetings, and that the keys were carried by the Nevada School Superintendent.

It was held that said School District 119 took, under the deed, an estate in fee simple determinable, in the described property. That it did not construe such words as "ceases to be used for that purpose" to mean a mere temporary secession of said district to conduct a school on said property. Furthermore, that the property did not cease to be used as a schoolhouse site merely because no school was conducted on the property from May 1, 1950 to May 10, 1951. That the matter involved intention as does the matter of abandonment and concluded that the trial court properly found no abandonment, and that the record fully sustains that finding.

In Board of Appling County v. Hunter, 10 S. E. (2d) 749, the Supreme Court of Georgia, in construing a provision contained in a deed conveying certain land for school purposes with a proviso that it shall be held as long as said land and premises are used for educational purposes, and after that said land is to return to grantor, his heirs and assigns, held that the fact that the school board built a larger school on nearby land and permitted school teachers to reside in the old school building would not suffice to show abandonment of property for school or education purposes. The court further said, 1. c. 750:

"2. In this suit by the board of educa-

Honorable Charles A. Weber

tion to recover the land from alleged assigns of the grantor, after they had taken possession under an alleged abandonment and reverter, while the court correctly charged that 'the board of education, under the terms of this deed and in the exercise of the rights granted thereunder, is not limited to the use of this land solely for the purpose of classroom work, but the term "school purposes," or "educational purposes" included any activity that is necessary in the proper maintenance and operation of a school under our present school system' in Georgia. It was error to qualify this charge by the further instruction that 'under the terms of that deed the board of education has the right to operate a school upon these premises, and in doing so they have a right to operate and maintain any other activity that is proper and necessary in the operation of such school'. "

In McCullough v. Swifton Consolidated School Dist., 155 S. W. (2d) 353, the Supreme Court of Arkansas construed a deed similar to the one in question, stating:

" 'Said property to be used for school purposes only, and should the said District No. 23 of Jackson County, Arkansas, at any time abandon said property, the title thereto shall revert back to Hugh B. McCullough or his legal heirs'."

Thereafter, said School District No. 23 was consolidated with Appellee District and later became owner of all the former property and liable for all its debts. Said Appellee District started tearing down the school building of the former District No. 23 located on the original site. The appellant brought an action to enjoin appellee. Appellee defended on the ground that it did not abandon the land for school purposes, but was tearing it down to build a school building for said defendant district out of material salvaged from the old building; that it was to be used to build a waiting station for pupils who came to meet

Honorable Charles A. Weber

the school buses, to be taken to the school in Swifton; also, that it would include a gymnasium. In so holding, the court concluded, page 354:

"This evidence clearly shows that said property had not been abandoned for school purposes. Now, the conveyance provided the conditions on which the property would revert to the grantor. It could 'be used for school purposes only', and if the District should abandon same at any time, it would revert. If appellant intended to provide in his deed that the property should revert in the event no school was conducted there, or if it should be abandoned as a school, he chose inept language to express his purpose. We think the trial court correctly held that the use to which appellee proposes to put the property is not in violation of the limitations in said deed and that appellee has not abandoned it for school purposes although it has done so as a school."

In view of the foregoing decisions, we are inclined to believe that the keeping of books, desks, and other personal property of the school district is tantamount to continuing to carry on school purposes on said premises, and in such case the school property does not revert to the grantor.

CONCLUSION

Therefore, it is the opinion of this department that as long as said school district continues to use the premises, and especially the school building, for such purposes as storage of school books, desks, and other property belonging to said school district and other related uses, and has not declared its intent to abandon said premises, that said property will not revert to the grantor under said deed.

Honorable Charles A. Weber

The foregoing opinion, which I hereby approve, was prepared by my assistant, Aubrey R. Hammett, Jr.

Very truly yours

John M. Dalton
Attorney General

ARH,Jr:lc

SALES TAX:
CLASSIFICATION OF SALES TAX
AS DEMAND AGAINST ESTATES:
ESTATES:
DECEDENTS' ESTATES:

Amounts due from decedent for sales tax collected by him should be classified as a demand of the third class rather than as a fifth class demand, but administrators should pay such amounts without demand.



January 19, 1955

Honorable J. Patrick Wheeler
Prosecuting Attorney
Lewis County
Monticello, Missouri

Dear Sir:

This is in reply to your recent request for an opinion of this office wherein you ask:

"Is a Claim or Demand for State Sales Tax Collected by deceased from purchasers, but not reported and paid to the State a 'Debt, including taxes due the State' as defined in Section 464.010 of Revised Statutes of Missouri 1949, to entitle the claim to be classed as a third Class Demand, or should it be classed as a fifth class demand under this Statute?"

Section 144.390 RSMo 1949 provides that such amounts collected by the decedent as sales tax and due and unpaid to the state "shall constitute a debt due the state." Chapter 144 further provides for the collection of such sales taxes collected by the seller and unpaid to the State of Missouri from the seller. Section 144.410 provides that the remedies of the state in the matter of collecting such sums are cumulative.

Section 464.010 RSMo 1949 provides for the classification of demands against the estates of deceased persons, and class three includes "all debts, including taxes due the state." It thus appears that the amounts about which you ask are taxes due the state from the deceased, and that they would properly fall in Class No. 3. It is further provided that it is the duty of

Honorable J. Patrick Wheeler

the executor or the administrator to pay such taxes without any demand therefor being presented to the court for allowance. Thus, in the case about which you inquire, it would not only be proper for the administrator to pay these amounts without demand but the statute makes it his duty to do so. However, if demand is made, it should be classified in class three, which specifically covers such taxes, rather than in class five which covers all general demands.

CONCLUSION

It is, therefore, the conclusion of this office that demands for sales tax moneys collected by the deceased from purchasers should be classified in class three and not in class five.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Fred L. Howard.

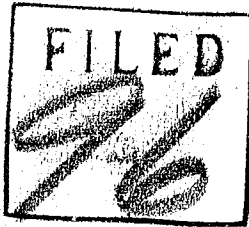
Very truly yours,

John M. Dalton
Attorney General

FLH:sm,lw

MOTOR VEHICLES:
FARM TRACTORS:
DRIVER'S LICENSE:

(1) "Farm tractor" exempted from registration law only to extent authorized in Sec. 304.260, RSMo 1949; (2) Farm tractor operated on public highway must conform to all traffic and equipment regulations; (3) Operator's or chauffeur's license required to operate farm tractor in nonexempt use; and (4) Farm wagon exempt from registration.



January 21, 1955

Honorable W. C. Whitlow
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

"We recently had an accident in this county involving a tractor and hay frame loaded with high school children on a 'hay ride'.

"The tractor was lighted but there were no lights on the hay frame. The tractor was being operated by a 16 year old boy, but he did not own the equipment.

"Several questions were raised regarding the operation of this tractor and wagon and I would appreciate your opinion on the following:

"1. Under Missouri law can a tractor, by virtue of its use and operation become a motor vehicle?

"2. If it cannot become a motor vehicle, is there any way to regulate the use of a tractor on the highway for non-farm uses such as a hay ride?

"3. Is an operator's license needed or required for a person operating a tractor on the highways for farm or non-farm use?

Honorable W. C. Whitlow

"4. While there seems to be little doubt that a farm wagon on the highway needs lights, I would like to know if a farm wagon being used for non-farm uses and for over the road use, even in connection with farming, needs to be licensed, and if it is subject to regulation and control as a motor vehicle?

"Your assistance in this matter would be appreciated."

In the following opinion we shall treat your questions in the order presented in the letter of inquiry.

1. In the consideration of the first question proposed, we direct your attention to the following definition of "farm tractor" as found in subsection (5), Section 301.010, RSMo Cum. Supp. 1953; also to the following definition of "tractor" found in subsection (26) of the same statute:

Subsection (5)

"'Farm tractor,' a tractor used exclusively for agricultural purposes;" (Emphasis ours.)

Subsection (26)

"'Tractor,' any motor vehicle, designed primarily for agricultural use or used as a traveling power plant or for drawing other vehicles or farm or road building implements and having no provision for carrying loads independently;" (Emphasis ours.)

From the foregoing, it appears that a "farm tractor" is a motor vehicle of a peculiar type whose distinguishing characteristic is its design and use for agricultural purposes. It is significant that the phrase "motor vehicle" appears in the definition of "tractor," thereby being incorporated by reference in the definition of "farm tractor."

We therefore examine the further definition of the phrase "motor vehicle" which is also defined in subsection (15) of the same statute in the following language:

"'Motor vehicle,' any self-propelled vehicle not operated exclusively upon tracks, except farm tractors;"

Honorable W. C. Whitlow

Reading this definition of the latter term into the composite definition of "farm tractor," it appears that a farm tractor loses its characteristics as such if not used exclusively for agricultural purposes. That such was the intent of the General Assembly is borne out by the provisions of Section 304.260, RSMo 1949, which is found as a part of Chapter 304, RSMo 1949, establishing traffic and equipment regulations. The statute mentioned reads in part as follows:

"Farm tractors when using the highways in traveling from one field or farm to another, or to or from places of delivery or repair are exempt from the provisions of the law relating to registration and display of number plates, but shall comply with all the other provisions hereof. * * *"

From the foregoing it appears that farm tractors, when used on the public highways, except in traveling from one field or farm to another, or to or from places of delivery or repair, must comply with the provisions of the law relating to registration and display of number plates.

2. Having determined that a "farm tractor" may, by virtue of its use, become subject to the registration provisions of the law, it becomes unnecessary to answer your second question. However, you will note that the quoted portion of Section 304.260, RSMo 1949, does subject farm tractors to all of the traffic and equipment regulations when using the public highways, and that without regard to the nature of the use then being made thereof.

3. With respect to the third question you propose, we direct your attention to the following exemption found in the chauffeur's and driver's license law as part of Section 302.080:

"The following persons are exempt from license hereunder:

"(1) Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;" (Emphasis ours.)

It appears from this exemption provision that a farm tractor temporarily operated upon the public highway, while retaining its characteristics as such, may be so operated without the necessity

Honorable W. C. Whitlow

of obtaining a chauffeur's or driver's license. However, in the event that the usage of the farm tractor is such as to constitute it a "motor vehicle," as determined under 1 above, then all of the provisions relating to chauffeur's and driver's licenses become effective and the particular type of license required is to be determined according to the nature of the operation.

4. With respect to the fourth inquiry you have proposed, it is believed that it may be answered by an official opinion of this department delivered under date of April 20, 1954 to the Honorable Max B. Benne, Prosecuting Attorney, Atchison County. Your attention is directed to the conclusion appended thereto, holding that such equipment need not be licensed as either a "motor vehicle" or "trailer." A copy of the complete opinion is enclosed.

CONCLUSION

In the premises, we are of the opinion:

1. That farm tractors are exempt from the laws relating to registration and display of license plates by motor vehicles when using the public highways only when traveling from one field or farm to another or to or from places of delivery or repair;
2. That farm tractors used on the public highways must comply with all traffic and equipment regulations found in Chapter 304, RSMo 1949;
3. That persons operating farm tractors on the public highways, in such a manner that such farm tractors become "motor vehicles," must have either a chauffeur's or driver's license dependent upon the nature of such operation; and
4. That farm wagons, when drawn by farm tractors on the public highways, are not required to be registered as either a "motor vehicle" or "motor vehicle trailer."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

Enclosure: 4-20-54 to Max B. Benne

CORONERS: Coroner should file report of findings or inquest with county clerk and also with circuit clerk when required by Section 58.350, RSMo 1949.



February 3, 1955

Honorable W. G. Whitlow
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request is as follows:

"Will you please advise me regarding the correct procedure to be followed by the Coroner after he has made a finding by his own observation or by coroner's jury.

"I had advised the Coroner that he should file his findings, or a transcription of the proceedings at the coroner's inquest, together with the findings of the jury, in the County Clerk's office. I find, however, in years past that some coroners have filed their findings in the Circuit Clerk's office.

"The statutes do not spell out exactly what procedure should be followed and I would appreciate your advice."

The only statutory provisions which we find dealing with the disposition of the transcript of the coroner's inquest are Sections 58.350 and 58.470, RSMo 1949. Section 58.350 provides as follows:

"The evidence of such witnesses shall be taken down in writing and subscribed by them, and if it relate to the trial of any person concerned in the death, then the coroner shall bind such witnesses, by recognizance, in a reasonable

Honorable W. C. Whitlow

sum for their appearance before the court having criminal jurisdiction of the county where the felony appears to have been committed, at the next term thereof, there to give evidence; and he shall return to the same court the inquisition, written evidence and recognizance by him taken."

Section 58.470, RSMo 1949, provides as follows:

"Whenever an inquest shall be held, and the coroner shall have good reason to believe that the deceased came to his death by poison administered by the hand of some person other than the deceased, he may, at the request of the jury, cause chemical analysis and microscopical examination of the body of the deceased, or any part of it, to be made; and the testimony of medical and chemical experts may be introduced for the purpose of showing how and in what manner the deceased came to his death, and the coroner shall certify to the county court of his county the fact of such analysis or examination, and testimony of such medical or chemical experts, and that the same was, in his opinion, necessary to an examination into the cause of the death of the deceased; and the court shall allow such fees or compensation for such analysis, examination or medical or chemical testimony of experts as shall be deemed by said court to be just and reasonable."

We find no statutory provisions relating to the coroner's filing of his findings or transcript of the inquest proceedings in situations other than those described in the two above statutes. These two statutes obviously do not cover all situations.

In the absence of any other statutory provision, we feel that the coroner is not required to deposit his findings or a transcript of the proceedings at the inquest with any particular officer. It does appear, however, that, in order to enable the county court properly to pass upon the payment of costs in connection with coroner's inquests, a copy of the finding or transcript of the inquest should be deposited with the county clerk

Honorable W. C. Whitlow

in all situations. Insofar as the circuit clerk is concerned, there would appear to be no reason for depositing a copy thereof with that officer other than in the situation covered by Section 58.350, quoted above.

CONCLUSION

Therefore, it is the opinion of this office that the coroner should file his findings or a transcript of the proceedings at a coroner's inquest, together with the findings of the jury, in the county clerk's office on all occasions and should also, when the evidence of witnesses relates to the trial of any person concerned in the death and the coroner binds such witnesses by recognizance, deposit a copy of the evidence with the clerk of the circuit court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW:ml

SCHOOL ELECTIONS: The board of directors of a city school
COUNTY SUPERINTENDENTS: district at a school election held
VOTING PLACES: separate and apart from a municipal
REGISTRATIONS: election, at which a county superin-
tendent of schools is to be elected
may fix a single voting place where voters of the district may
cast their ballots, or if such election is held in conjunction
with a municipal election on the same date, the board may design-
ate voting places for the casting of ballots in said election
in the residential wards and precincts of the voters of such
city. All voters residing in a city of the third class having
a population of not less than 10,000 nor more than 30,000 in-
habitants are not required to be registered to vote for county
superintendent of schools when board has designated a single
voting place, under terms of Section 165.330, RSMo 1949.



May 13, 1955

Honorable W. C. Whitlow
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Whitlow:

This will refer to your letter requesting the opinion
of this office on the subjects mentioned in your request,
which reads as follows:

"At the request of the County Clerk and
the Board of Directors of the Fulton
School District I would like your opinion
regarding legality of the school district
maintaining one voting place for a school
election at which a County Superintendent
of Schools will also be elected. I am en-
closing a statement of facts which, I be-
lieve, covers the situation involved
thoroughly.

"The questions as I understand them are:

1. Can a single voting place be
used by the school district at a
school election at which a County
Superintendent of Schools is to
be elected?
2. Does the regular registration
required of voters in a general
election apply to the election of
a County Superintendent of Schools?

Honorable W. C. Whitlow

"I would appreciate your immediate attention to these questions since the election is to be held on April 5.

"After reading Sections 167.020 and 165.330 it is my off-hand opinion that a County Superintendent of Schools is elected at a school election in a manner prescribed by the Board of Directors as long as it does not violate the general election safeguard as provided by the Constitution and statute.

"I regret to say, however, that my opinion as Prosecuting Attorney won't be accepted and it takes the personal designation of the Attorney General to make the opinion acceptable."

Statute numbers herein, unless another revision is specifically given, refer to RSMo 1949.

Your request submits the following questions:

- 1) Can a single voting place be used by the school district at a school election at which a County Superintendent of Schools is to be elected?
- 2) Does the legal registration required of voters in a general election apply to the election of a County Superintendent of Schools?

Considering your first question, we turn to Section 167.010. That section provides for the election every four years of a County Superintendent of Schools. Said section reads, in part, as follows:

"The qualified voters of each and every county in this state shall elect a county superintendent of public schools at the annual district school meeting held on the first Tuesday in April, 1943, and every four years thereafter. * * *"

Honorable W. C. Whitlow

The time and the manner of holding a district school election as required by Section 167.010, supra, are provided for by Section 165.330, which reads, in part, as follows:

"1. The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at six o'clock a.m. and closing at seven o'clock p.m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records.

"2. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; provided, that in all cities and towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants, said elections may at the option of the board be held at the same time and places as the election for municipal officers with the judges and clerks of such municipal election serving as judges and clerks of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose.

Honorable W. C. Whitlow

"3. Should such school district embrace territory not included in the limits of such city or town, the qualified voters thereof may vote at such voting precinct as they would be attached to, provided the ward lines thereof were extended and produced through such adjoining territory; provided, that in any year in which a county superintendent of public schools is to be elected that the qualified voters of such town, city or consolidated district where registration of voters is required, must vote in the ward or precinct of which they are residents, if the place of voting has been so designated by the board of education; provided, that if there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town and said school election shall be conducted within the limits of such other incorporated city or town in the same manner as hereinbefore provided for cities or towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants."

Under paragraph 2 of said Section 165.330 one of the propositions to be submitted to the voters of such district at the annual school meeting every four years, is the election of a County Superintendent of Schools. Said section, at the option of the board, permits the board to provide for the holding of such election at the time and place as the election for municipal officers. The section provides that said election shall be held at such convenient place or places within the district as the board may designate, with the judges and clerks of such municipal election serving as judges and clerks of said school election, but the ballots of the school election shall be on a separate piece of paper and be deposited in a separate ballot box kept for that purpose. Said paragraph 2 of said Section 165.330 is not mandatory as to one or more place or places where the voter at such election shall cast a ballot. The fixing of the place or places for voting is directory in the sense that the number of places for voting by the voters is discretionary with the board.

Honorable W. C. Whitlow

The case of Armantrout vs. Bohon, an election contest case for the office of County Superintendent of Schools in Marion County, Missouri, involving the authority of the board of directors to designate one voting place in the City of Hannibal in the election for County Superintendent of Schools was considered and decided by the Supreme Court of this state, 349 Mo. 667, 162 S.W. (2d) 867. The contest for the office arose from that act of the board of directors. The contestant claimed that by designating only one place in the school district for ballots to be cast for County Superintendent of Schools, a sufficient number of voters were denied a place to vote who would have voted for contestee for said office to have elected her if sufficient voting places had been designated by the board.

The Court held that the designation by the board of one voting place in the City of Hannibal and adjacent territory comprising the school district for the annual school meeting election, which included an election of County Superintendent of Schools and the election resulting in the election of the contestee to the office of County Superintendent of Schools was valid under the terms of the statute. The Court so holding, 162 S.W. (2d) 1.c. 871, said:

"As we understand it, the appellant does not contend that any mandatory law, constitutional or statutory, was violated and we are unable to find any such violation from her allegations. The quoted statute (Sec. 10483, R. S. Mo. 1939, Mo. R.S.A. Sec. 10483) says the voting shall be 'at such convenient place or places * * * as the board may designate.' It may 'at the option of the board' be held at the same time and place as city elections are held in certain counties. But none of these provisions may be construed as mandatory. It does not appear that any city elections were being conducted at the time. There are times conceivably, when one voting place in Hannibal would be adequate for the submission of school matters to the voters of the district, although we doubt that to be the case when there is a contest over the office of county superintendent. But even so, we cannot say that the board's designation of only

Honorable W. C. Whitlow

one voting place in that district was a violation of any mandatory provision of the law, even though it did not provide places easily accessible and convenient to the voters. The board may not have used the best judgment in selecting voting places but that only one place was designated, in this instance and under the circumstances, is not such an abuse of their discretion, or disregard of the election laws that the election may be invalidated for this reason. * * *

The statute on this subject then before the Court for construction respecting the authority of the board of directors of a school district to designate the voting place or places within the district where the election shall be held (Section 10488, RSMo 1939), has not been repealed or modified in that respect. The present section on the question is 165.330. It is therefore clear, considering the statutes, that the board does have the authority to designate one voting place in the school district as the district may be embraced by the territorial limits of the City of Fulton for the annual school election including the election of a County Superintendent of Schools for said Callaway County.

Considering your second question it appears that the City of Fulton is a city of the third class, having a population, according to the last decennial census, of 10,052 inhabitants.

Section 114.010 RSMo 1949 requires the registration of voters in cities of 10,000 and less than 30,000 inhabitants. Said section reads as follows:

"In all cities of the state, whether organized under general law or special charter, which now or hereafter have a population of ten thousand and less than thirty thousand inhabitants, except cities in counties where registration is now provided by law, there shall be a registration of all the qualified voters pursuant to the provisions of this chapter. The population

Honorable W. C. Whitlow

of cities within the state shall for the purposes of this chapter be ascertained from and determined by the last federal decennial census."

Section 114.020, in effect states that in all such cities (those referred to in Section 114.010), elections shall be conducted in the same manner as that provided by Chapters 111 to 129, RSMo 1949, in so far as the procedure does not conflict with Chapter 114.

Section 114.020 reads as follows:

"All elections in such cities shall be conducted in all respects as provided in this chapter and subject to all the provisions of chapters 111 to 129, RSMo 1949, so far as the same do not conflict with this chapter."

Section 114.040, defines the qualifications of the voters in cities of this class and reads as follows:

"Every citizen of the United States who is over the age of twenty-one years, who has resided in the state one year next preceding the election at which he offers to vote, and during the last sixty days of that time shall have resided in the city and during the last ten days of that time in the ward or precinct at which he offers to vote, who has not been convicted of a felony or a misdemeanor connected with the exercise of the right of suffrage, who is not an idiot or an insane person and who is not kept in any poorhouse or confined in any public prison, shall be entitled to vote at such election for all officers, state or municipal, made elective by the people, or at any other election or primary held in pursuance of the laws of the state; but he shall not vote elsewhere than in the election precinct where his name is registered, and whereof he is registered as a resident unless otherwise provided in this chapter."

Honorable W. C. Whitlow

Chapter 111, RSMo 1949, is in regard to the manner of holding elections generally, and Section 111.010 of that chapter specifically provides that the chapter does not apply to school elections, and reads as follows:

"The provisions of this chapter shall apply to all the election precincts in this state but shall not apply to township or village elections, to school elections, or to any city election in cities of the fourth class, or in cities of under three thousand inhabitants existing under any special law."

Section 114.010, supra, states that all qualified voters of cities having a population of not less than 10,000, nor more than 30,000 inhabitants must register, and since this section, Section 114.010, and Section 114.040 do not provide any exception to the qualifications or registration of voters, upon first thought it would appear that before a voter in a city of this class could vote in a school election for county superintendent of schools, he must comply with such statutory provisions, particularly those requiring him to register. However, it is our view that in order to vote in elections of this kind a resident of such city is not required to have been previously registered in order to vote, except in one instance which was mentioned in our discussion of the first inquiry.

It will be recalled that in the instance referred to, we stated that when under the provisions of 165.330, supra, in cities having a population between 2,000 and 75,000 inhabitants the Board of Education had designated the same voting places for a school election at which a county superintendent of schools was to be elected as those for a municipal election, when the school election was to be held in conjunction with the municipal election, that the voters were required to be registered at the ward or precinct in which they offered to vote. In all other instances it is believed that voters in such school elections are not required to be registered in order to vote for a county superintendent of schools.

The statute governing the holding of elections generally do not apply to school elections as we have already noticed from the provisions of Section 111.010, supra. This principle of law was also emphasized by the Court in the case of *Armentrout v. Bohon*, supra, in which the Court stated at 1.c. 870:

Honorable W. C. Whitlow

"While the general statutes relating to election contests apply to the office of county superintendent of schools the general election laws do not apply to the procedure to be followed in electing the superintendent. Article 14, Chapter 72, R.S.Mo. 1939, Mo. R.S.A. Sec. 10609 et seq. provides for such officials, their powers and duties as well as their election. * * *"

Again we call attention to Section 167.020, supra, which appears to provide a complete system for the election of the county superintendent of schools every four years. This section makes no requirement that the voters of a third, or any other class city, must have been registered in the wards of which they are residents before they shall be allowed to vote.

When the Board of Education exercises its discretion under the provisions of Section 165.330, supra, and designates a single voting place in such cities for an election at which a county superintendent of schools is to be elected, the statutory provisions relating to registration have no application, and if the voters possess the other statutory qualifications they are entitled to vote in all such elections.

In view of the foregoing and in answer to the second inquiry, it is our thought that the regular registration required of voters of a third class city in a general election does not apply to an election for a county superintendent of schools when the Board of Education has designated a single voting place for said election.

Your third inquiry is in regard to the registration requirements pertaining to school district elections within the City of Fulton, where registration is required. We have previously stated that Fulton is a city of the third class, and it is believed that the discussion and answers given to the first and second inquiries fully answers the third inquiry, hence, no further discussion will be given upon the third inquiry.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office under the statutes herein noted:

Honorable W. C. Whitlow

1) That a single voting place may be used by the school district at a school election held independently of a municipal election provided for by the board at which a County Superintendent of Schools is to be elected, or if such election is held in conjunction with a general municipal election for officers and the Board of Directors so designates, voting places may be designated to be in residential wards and precincts of the voters in cities of the third class which contain city school districts.

2) That all voters who are residents of a city of the third class, having a population of not less than 10,000, nor more than 30,000 inhabitants, are not required to be registered to vote at a school election at which a county superintendent of schools is to be elected, when the Board of Education of the school district of said city has designated a single voting place for such election, under the provisions of Section 165.330, RSMo 1949.

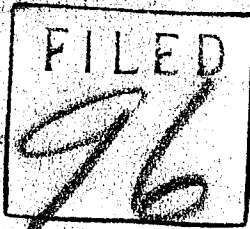
The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC:ma,vlw

COUNTY HOSPITALS: Four questions relating to duties of boards of trustees of county hospitals.



June 8, 1955

Honorable Jay White
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office in which you submit four questions relating to the powers and duties of boards of trustees of county hospitals. In the preparation of this opinion we have considered and will set out the questions in the same sequence submitted.

Your Question No. 1 reads as follows:

"Question 1. Is it necessary that a detailed, itemized statement showing each vendor, the exact product for which the voucher was written and the amount shown for that item, or (2) a general statement of receipts and expenditures for each of the departments that is set up, or (3) one general statement showing all the receipts and all of the expenditures?"

This question arises under the provisions of subsection 7, of Section 205.190, RSMo 1949, reading as follows:

"7. One of said trustees shall visit and examine said hospital at least twice each month and the board shall, during the first week in January of each year, file with the county court of said county a report of their proceedings with reference to such hospital and a statement of all receipts and expenditures during the year; and shall at such time certify the amount necessary to maintain and improve said hospital for the ensuing year."

This portion of the statutes relating to the county hospital law has not been construed by any of the appellate courts

Honorable Jay White

of this state so far as we are able to ascertain. However, examining the entire chapter relating to such institutions seems to indicate that the purpose of the "report" provided for therein is that a public record be made of the actual operation of the county hospital. It seems that such report need not descend into particularities with respect to each item of disbursement, but that it should incorporate information relative to the number of patients, cost of operation of various departments, such as food, drugs, medical attention, etc., and other matters of a general nature which in a concise manner will reflect the expenses incident to the operation of the various departments of the institution.

Your Question No. 2 reads as follows:

"Question 2. What is the interpretation of the word 'maintenance' as written in the law? (1) does it mean just general repair of the building or (2) does it mean general support in maintaining the operation of the hospital as a unit, whether it be for upkeep of buildings, services, or supplies?"

Under the provisions of Section 205.160, RSMo 1949, authorization has been granted to the county courts of the several counties of this state to issue bonds upon an affirmative vote of the electorate of their counties for the purpose of establishing, constructing, equipping, improving, extending, repairing and maintaining public hospitals. However, in view of other statements contained in your letter of inquiry, it seems that you are primarily concerned with the provisions of Section 205.200, MoRS, Cum. Supp., 1953. This statute reads as follows:

"Except in counties operating under the charter form of government, the county court in any county wherein a public hospital shall have been established as provided in sections 205.160 to 205.340, shall levy annually a rate of taxation on all property subject to its taxing powers in excess of the rates levied for other county purposes to defray the amount required for the maintenance and improvement of such public hospital, as certified to it

Honorable Jay White

by the board of trustees of the hospital; the tax levied for such purpose shall not be in excess of twenty cents on the one hundred dollars assessed valuation. The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none other."

Although the phrase "maintenance and improvement" has no particular or technical meaning in law and must be construed when used in statutes in accord with their context, it does appear that such phrase has been repeatedly defined as comprehending more than the mere preservation of physical facilities. As used in connection with schools, hospitals and other public institutions, it seems to convey the meaning of not only preserving physical facilities, but the furnishing of necessary services and supplies incident to the operation of the institution to which it refers. Your attention is directed to the numerous definitions of the word "maintenance" and associated words found 26 Words and Phrases, Perm. Ed., page 96. In view of the related statutes defining the powers and duties of the boards of trustees, particularly with respect to the promulgation of rules and regulations for the government of the county hospital, the power to employ personnel, and the unrestricted authority to receive and expend public funds on behalf of such institution, it seems to us that the phrase "maintenance and improvement" has been used in the statute under consideration in the broad sense.

Your Question No. 3 reads as follows:

"Question 3. What is the interpretation of 'the Board shall, during the first week in January of each year, file with the County Court a report of their proceedings'? Does this mean the filing of the minutes of each Board meeting? If not, what does it refer to?"

What has been said in answer to your Question No. 1 we believe fully answers your Question No. 3.

Your Question No. 4 reads as follows:

"Question 4. Does the Hospital Board have to file with the County Court a budget for the ensuing year? If so, (1)

Honorable Jay White

is this to be a general budget of all operations, or (2) a budget only for the amount of tax money anticipated for the ensuing year?"

Examination of the county budget law and of the county hospital law does not disclose any statutory requirements that the boards of trustees of such institutions are required to submit a budget at the commencement of each fiscal year. In this regard your attention is directed to a prior official opinion of this department delivered under date of October 19, 1951, to the Honorable R. M. Gifford, Prosecuting Attorney, Sullivan County, particularly the portion thereof beginning on page five. You will note that the effect of the reasoning found in such opinion discloses no statutory requirement for the incorporation of county hospital funds in the general budget of the county nor any requirements that the trustees of such institution submit a budget to the county court. A copy of this opinion is enclosed herewith.

However, it is to be observed that under the provisions of subsection 7 of Section 205.190, RSMo 1949, quoted in connection with question 1, that during the first week in January of each year the board of trustees is required at such time to certify the amount necessary to maintain and improve the hospital for the ensuing year. While not in any sense a "budget" requirement, yet this provision must be observed.

CONCLUSION

In the premises we are of the opinion:

1. That the "report" required to be filed with the county court of a county wherein there is located a county hospital need not descend into particularities with respect to each item of income or expenditure made by the board of trustees of such institution, and that the requirements of the statute requiring such report will be fully met by the filing of one of a general nature outlining in a general way the operations of such board of trustees;
2. That the term "maintenance and improvement" as used in the statute relating to the levying of funds for county public hospital contemplates the expenditure of such funds for the preser-

Honorable Jay White

vation of the physical facilities of such institution, the payment for personal services rendered and the supplying of necessary medicine, food and similar matters directly related to the operation of such institution; and

3. That no statutory requirement exists necessitating the filing with the county court by the boards of trustees of county hospitals of a budget at the inception of each fiscal year, but that the certification of the amount necessary to maintain and improve such hospitals for the ensuing year must be certified to the proper county court during the first week in January of each calendar year.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

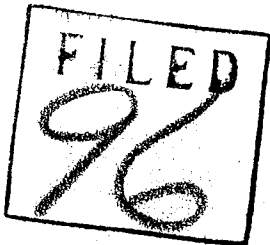
John M. Dalton
Attorney General

WFB,Jr:lc

1 enclosure

STATE BOARD OF EDUCATION:
SOCIAL SECURITY:
VOCATIONAL REHABILITATION:

House Bill No. 202, 68th General Assembly, authorizes State Board of Education to formulate and execute plan of agreement in carrying out provisions of Federal Social Security Act in making determination of disability under Title II thereof. State Board has authority to designate Vocational Rehabilitation Section to administer such plan.



June 15, 1955

Honorable Hubert Wheeler
Commissioner and Executive Officer
State Board of Education
Jefferson Building
Jefferson City, Missouri

Dear Mr. Wheeler:

This is in response to your request for opinion received in this office on June 6, 1955, which reads, in part, as follows:

"I shall be glad to have your advice and official opinion in answer to the following questions:

"(1) Does H.B. 202, 68th General Assembly, authorize the State Board of Education to formulate and execute a plan of agreement in carrying out the provisions of the Federal Act in making determination of disability under Title II of such Act?

"(2) Since the State Board of Education is empowered and directed to make an agreement under the Federal Social Security Act for making determination of disability and the State Board has full authority and jurisdiction over the Vocational Rehabilitation Section, would it have authority to delegate to the Rehabilitation Section the administration of the plan established by the agreement?"

Sections 1 and 2 of House Bill No. 202, to which you refer, read as follows:

Honorable Hubert Wheeler

"Section 1. The state board of education is hereby empowered and directed to enter into an agreement on behalf of the state with the secretary of U.S. Department of Health, Education and Welfare to carry out the provisions of the Federal Social Security Act, as amended, relating to the making of determinations of disability Under Title II of such Act.

"Section 2. All moneys paid by the federal government to the state to carry out the agreement referred to in section 1 of this Act shall be deposited in the state treasury to the credit of a special fund to be known as the Disability Freeze Fund, which is hereby created. All moneys in said fund shall be disbursed on warrants issued in accordance with requisitions of the state board of education."

Section 3 of said act contains the emergency clause.

The above House Bill refers to the Federal Social Security Act relating to the making of determinations of disability under Title II of such act. Section 221 of Public Law 761, 83rd Congress, Ch. 1206, H.R. 9366, Amendments to Title II of the Social Security Act, reads, in part, as follows:

"Sec. 221. (a) In the case of any individual, the determination of whether or not he is under a disability (as defined in section 216 (1)) and of the day such disability began, and the determination of the day on which such disability ceases, shall, except as provided in subsection (g), be made by a State agency pursuant to an agreement entered into under subsection (b). Except as provided in subsections (c) and (d), any such determination shall be the determination of the Secretary for purposes of this title.

"(b) The Secretary shall enter into an agreement with each State which is willing to make such an agreement under which the

Honorable Hubert Wheeler

State agency or agencies administering the State plan approved under the Vocational Rehabilitation Act, or any other appropriate State agency or agencies, or both, will make the determinations referred to in subsection (a) with respect to all individuals in such State, or with respect to such class or classes of individuals in the State as may be designated in the agreement at the State's request."

Section 222 thereof also reads, in part, as follows:

"Sec. 222. It is hereby declared to be the policy of the Congress in enacting the preceding section that disabled individuals applying for a determination of disability shall be promptly referred to the State agency or agencies administering or supervising the administration of the State plan approved under the Vocational Rehabilitation Act for necessary vocational rehabilitation services, to the end that the maximum number of disabled individuals may be restored to productive activity."

The state agency administering the state plan approved under the Vocational Rehabilitation Act is the State Board of Education. Sections 162.280 - 162.320, RSMo 1949.

Section 160.010, RSMo 1949, creates the Department of Education and Section 160.020, RSMo 1949, creates the State Board of Education, which is the governing body of the Department. Section 160.090, RSMo 1949, enumerates many specific duties of the State Board of Education, and Subsection 3 thereof states that "The Board shall have such other powers and duties as may be prescribed by law."

The Legislature, by House Bill No. 202, has not only empowered but has directed the State Board of Education to enter into an agreement with the Secretary of the U.S. Department of Health, Education and Welfare to carry out the provisions of the

Honorable Hubert Wheeler

Federal Social Security Act, as amended, relating to the making of determinations of disability under Title II of such act. The plan to which you refer will merely be a part of that agreement.

The Vocational Rehabilitation Section is merely a part of the Department of Education, of which the State Board of Education is the governing body. Therefore, the State Board does have the authority to designate the Vocational Rehabilitation Section as the agency to administer the plan to be established by the agreement with the above federal agency.

CONCLUSION

It is the opinion of this office that House Bill No. 202, 68th General Assembly, authorizes the State Board of Education to formulate and execute a plan of agreement in carrying out the provisions of the Federal Social Security Act in making determination of disability under Title II of such act.

It is the further opinion of this office that the State Board of Education has the authority to designate the Vocational Rehabilitation Section of the Department of Education as the agency to administer the plan to be established by the agreement with the Secretary of the U.S. Department of Health, Education and Welfare.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml:gm

COUNTY SURVEYORS: (1) County surveyors to make surveys under Sec. 60.120 RSMo 1949 "when called upon," but not to exclusion of other competent surveyors. (2) Sec. 60.170 RSMo 1949 imposes mandatory duty on county surveyor to make surveys on "orders of survey." (3) Only surveys made by county surveyor entitled to become part of official "record of surveys" required under Sec. 60.340 RSMo 1949. (4) Willful and malicious destruction of landmarks is a misdemeanor under Sec. 560.530 RSMo 1949. (5) Surveying of corners in decayed or perishable condition under Sec. 446.010 RSMo 1949 may be accomplished by one other than county surveyor. (6) Surveys under procedure set forth in Secs. 446.040 to 446.170 RSMo 1949 to be accomplished only by county surveyor. (7) Neglect to make surveys and plats required by Sec. 137.185 RSMo 1949 constitutes misdemeanor under Sec. 137.190 RSMo 1949. (8) Right to make surveys under Sec. 137.185 RSMo 1949 not exclusive right of county surveyor unless same are made pursuant to "orders of survey" issued by county court or city council of city, town or village.

July 27, 1955

Honorable Jay White
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Sir:

The following opinion is rendered in reply to questions you have submitted on behalf of the county surveyor of Phelps County, and appearing in his letter of June 9, 1955, addressed to you, such queries reading as follows:

"(1) When the service of the Phelps County Surveyor are available, and he is resident and present in the county, has the county surveyor of another county (such as Pulaski or Dent) the right to come into Phelps County to establish or re-establish section corners? In the event the Pulaski or Dent County surveyor DOES so enter the county and set such corners, then what is the legal status of his survey (and the corners he may set) when he does NOT FILE ANY RECORD OR MAP in the office or offices of Phelps County court, county recorder, or county surveyor, Suppose he SHOULD file such a record, but in the DENT OR PULASKI county offices. How does THAT action meet the requirements set forth in Chapter 60, Chapter 446, and Chapter 445?

Honorable Jay White

"(2) When a farmer or other land owner pulls up government or county surveyor section corners, in order to replace them with fence posts - what is the legal remedy, and procedure to be followed?

"(3) Under Chapters 60 and 446 - or any other Missouri law--can section corners, or corners of subdivisions thereof (as of 40-acre or 10-acre tracts) are PRIVATE SURVEYORS (not county surveyors) authorized to set or relocate and reset such corners - or is this an exclusive duty and right of the county surveyor?

"(4) What is the procedure to be followed when land owners lay out for themselves (without formal county survey) small lots, less than 10 acres, of irregular shape, of form such as make description as regular fractional parts of such 40 or 10 acre lots impossible? This falls under Sec. 137.185 (page 1283) RSMo 1949. There are literally hundreds of such tracts or cases in this county-the number is growing each day."

Investigation discloses that Phelps County is a county of the third class, and the county surveyor therein is required, before entering upon the duties of his office, by Section 60.030, RSMo 1949, to enter into a bond conditioned, in part, as follows:

" * * * that he will faithfully perform all the duties of the office of county surveyor, and that at the expiration of his term of office he, or in case of his death, his executors or administrators, will immediately deliver to the recorder of deeds of the county all the records, books and papers appertaining to his office; * * *"

At this point we refer to two statutes, Sections 60.120 and 60.170 RSMo 1949, which disclose the two sources from which a county surveyor in a county of the third class derives authority to make surveys and charge the statutory fees set forth in Section 60.110 RSMo 1949, as amended, Cumulative Supplement, 1953.

Honorable Jay White

Section 60.120 RSMo 1949, provides:

"The county surveyor shall, within ten days, when called upon, survey any tract of land or town lot lying in his county, at the expense of the person demanding the same; provided, that his legal fees are first tendered, or that he and his deputies are not engaged in executing previous orders of survey."

Section 60.170 RSMo 1949, provides:

"The county surveyor shall execute all orders to him directly by any court of record, for surveying or resurveying any tract of land, the title of which is in dispute before such court, and all orders of survey for the partition of real estate."

A reading of Section 60.120 RSMo 1949, quoted above, discloses under what circumstances the county surveyor is obligated under the statute to make his services available to the general public. It should be noted that the county surveyor functions under the statute "when called upon," and no language therein clothes such public official with authority to insist on making all surveys which may be desired by any persons who have an interest in establishing boundaries of land tracts lying within the county.

The above quoted Section 60.170 RSMo 1949, may be aptly referred to as the law which discloses mandatory duties to be carried out by the county surveyor. Surveys made under authority of such statute are not made at the behest of private persons, but upon orders of survey issued by courts of record. County courts are also authorized to direct orders of survey to the county surveyor under applicable statutes.

Section 60.150 RSMo 1949 dealing with surveys as legal evidence is not to be overlooked since its language refutes any contention that a county surveyor has the sole right and authority to make all surveys in the county. Such statute provides:

"No survey or resurvey, hereafter made by any person, except that of the county surveyor or his deputy, shall be considered legal evidence

Honorable Jay White

in any court in this state, except such surveys as are made by the authority of the United States or by mutual consent of the parties."

The construction to be placed on statutes appearing in Chapter 60 RSMo 1949 entitled "County Surveyors and Surveys" is reflected in the language of Section 60.330 RSMo 1949, reading as follows:

"This chapter shall in nowise be construed either to affect the legality of surveys heretofore legally made and recorded, or to prevent surveyors from taking advantage of any corners previously legally established."

Under Section 60.340 RSMo 1949, the county surveyor is required to keep a fair and correct record of all surveys made by himself and his deputies and such record becomes the "record of surveys" of the county to be preserved in the office of the county recorder. A duly certified copy of any survey appearing in the "record of surveys" is to be accepted as evidence, to all intents and purposes, as the originals themselves.

In the case of *Ghostner et al. v. Schrock*, Sup. 64 S.W. (2d) 664, the Supreme Court of Missouri was construing what is now Section 60.150 RSMo 1949, quoted *supra*, which statute decrees what surveys are to be considered legal evidence. The court spoke as follows at 64 S.W. (2d) 664, l.c. 666:

"This statute does not make the surveys in question conclusive evidence of the true line. The provision of the statute which makes the survey of the county surveyor or his deputy 'legal evidence' evidently means that such surveys, when made in accordance with the statute, are admissible in evidence, and are *prima facie* evidence of their own correctness, but not conclusive, and may be overthrown and disproved by any competent evidence. Neither does the statute prohibit the introduction in evidence of surveys made by private persons or by any public surveyor, provided the correctness of such surveys has been established by competent evidence." (Underscoring supplied)

Honorable Jay White

On the question of what surveys are entitled to record in the "record of surveys" of the county, the following language is quoted from Carter v. Hornback, 139 Mo. 238, 1.c. 243:

"But it is claimed by counsel for plaintiff that it was proven that Lloyd was in fact deputy county surveyor, and also that his survey was made by mutual consent of the parties there interested, and therefore the record was admissible. We must confess our inability to see the force of this argument. Such evidence did not make it an official survey, and it was only as such that it was entitled to record in the record of surveys of the county, and it is only under these conditions that the record or a duly certified copy thereof can be received in evidence. Now, if the survey was made by mutual consent of the parties to the suit it would have been competent evidence. R.S. 1889, Sec. 8312. But the record would not be competent evidence even then, while the original would be." (Underscoring supplied.)

In Carter v. Hornback, quoted supra, the court had under review what is now Section 60.150 RSMo 1949.

Sections 60.210 to 60.310 RSMo 1949 contain definite instructions to county surveyors touching the division of sections of land into halves, quarters, eighths and sixteenths; the establishment of blank quarter section corners, subdivision of fractional sections, establishment of decayed or destroyed section corners and the manner of perpetuating corners. It will suffice to say in relation to such statutes that they prescribe a procedure to be followed by a county surveyor when he is accomplishing an official survey to become a part of the "record of surveys" of the county, but in only one of the eleven statutes referred to above as Sections 60.210 to 60.310, RSMo 1949, do we find the "county surveyor" referred to by title once, and in Section 60.310 RSMo 1949, prescribing how corners are to be perpetuated, we find "every surveyor" referred to. This leads to the conclusion that such statutes are to be considered as laying down rules to be followed without deviation by county surveyors when making official surveys, and as accepted procedure to be followed by any surveyor accomplishing the ends to which such statutes are directed.

Honorable Jay White

Under Section 60.320 RSMo 1949, county surveyors and their deputies are charged with the duty of reporting violations of law relative to the destruction of landmarks which come under their observation, or of which they have knowledge, to the grand jury or to the prosecuting attorney of the county in which the violation occurs. Section 560.530 RSMo 1949, relating to the destruction of landmarks, provides:

"Every person who shall willfully or maliciously, either: First, remove any monument of stone or any other durable material, created for the purpose of designating the corner or any other point in the boundary of any lot or tract of land, or of the state, or any legal subdivision thereof; or, second, deface or alter the marks upon any tree, post or other monument, made for the purpose of designating any point in such boundary; or, third, cut down or remove any tree upon which any such marks shall be made for such purpose, with intent to destroy such marks, shall, upon conviction, be adjudged guilty of a misdemeanor."

Sections 446.010 to 446.170 RSMo 1949 deal with the establishment of land boundaries. Section 446.010 RSMo 1949, provides:

"Any person, his agent or attorney, owning or being interested in any tract of land within this state, any corner or corners of which shall be in a decayed or perishable condition, may require the surveyor of the county to make a survey thereof."
(Underscoring supplied.)

8 Section 446.040 RSMo 1949, provides:

"When the corner or corners of any survey shall have been destroyed or obliterated by time or accident, the owner of such survey, or of any other lands, the title of which may be affected by the loss of any such corner, may call on a magistrate of the county in which the land shall be situate, for the purpose of establishing such corners by testimony."

It will be noted that when it is sought to survey corners in a decayed or perishable condition under authority contained

Honorable Jay White

in Section 446.010, RSMo 1949, quoted above, the person interested may require the county surveyor to accomplish the survey, but the language of the statute is permissive as to the land owners right to choose the county surveyor. A reading of Sections 446.040, RSMo 1949, quoted above, and the succeeding sections to and including Section 446.170, RSMo 1949, discloses a distinct procedure for establishing destroyed corners by oral testimony of witnesses, and when such procedure is employed the county surveyor is specially designated as the surveyor to survey, plat and issue his certificate in accordance with the testimony of witnesses whose testimony is to form the basis for the survey. In this particular type of proceeding it must be reasonably concluded that only the county surveyor may make the survey, plat, certificate and deliver the same to the county recorder for official record. (Underscoring supplied).

The surveying of tracts of less than one-sixteenth of a section of land in counties, both within and without the corporate limits of any city, town or village is treated in Section 137.185, RSMo 1949. The language of the statute discloses its purpose to be to effectuate intelligent description of lots and blocks in aid of proper assessment of property taxes. When treating of surveys to be made of these small tracts lying outside of any city, town or village, the statute provides that the surveys and plats thereof are to be made by a "surveyor in the county," with the additional provision that if such surveys and plats are not accomplished by the person, company or corporation subdividing the tracts, the county court may require the county surveyor, by order of record, to do such work. As to tracts lying within the limits of any city, town or village, the statute provides that the city council may have such tracts surveyed and platted by the city surveyor, "or other competent surveyor." Nothing in such statute discloses that the county surveyor may preempt the field in making such surveys unless ordered to do so by the county court when such surveys have not been accomplished by others competent to make the same. A person, company or corporation failing to have surveys and plats made as required by Section 137.185 RSMo 1949, is subject to prosecution under Section 137.190 RSMo 1949, which provides:

"Any person, company or corporation that may hereafter violate the provisions of section 137.185 shall upon conviction be deemed guilty of a misdemeanor."

The conclusions hereinafter stated are directed to the inquiries made in the opinion request and are based on a construction of cited statutes and excerpts from adjudicated cases germane to the questions.

Honorable Jay White

CONCLUSION

It is the opinion of this office that (1) Section 60.120, RSMo 1949 makes it the duty of a county surveyor to make surveys in his county only "when called upon" by the person demanding the survey, and such statute confers no right on the county surveyor to make such surveys to the exclusion of other competent surveyors; that (2) Section 60.170 RSMo 1949, imposes an obligation on the county surveyor to make surveys upon "orders of survey" issued to him by courts of record; that (3) Section 60.340 RSMo 1949 providing for a "record of surveys" to be maintained by the county surveyor is complimented by Section 60.150, RSMo 1949, and only surveys made by the county surveyor are to be termed "official surveys" and entitled to become a part of the "record of surveys" of the county; that (4) the willful or malicious destruction of landmarks is a misdemeanor under Section 560.530, RSMo 1949; that (5) the surveying of corners in a decayed or perishable condition under authority of Section 446.010 RSMo 1949 may be accomplished by one other than the county surveyor; that (6) procedure set forth in Sections 446.040 to 446.170 RSMo 1949 for establishing destroyed corners by oral testimony of witnesses contemplates that surveys accomplished pursuant to such procedure are to be made only by the county surveyor; that (7) the neglect of the duty placed upon a person, company or corporation under Section 137.185 RSMo 1949 to make surveys and plats of tracts less than one-sixteenth part of a section constitutes a misdemeanor under Section 137.190 RSMo 1949, and the right to make such surveys is not the exclusive right of the county surveyor unless he makes the surveys pursuant to an "order of survey" issued by the county court or a city council of any city, town or village.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

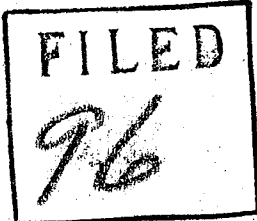
Very truly yours,

JOHN M. DALTON
Attorney General

JLO'M:gm

PROSECUTING ATTORNEY'S COUNTY
HOSPITAL DEPOSIT FEES:

It is the duty of the prosecuting attorney to institute and collect accounts due a county hospital; the \$5 deposit in Magistrate Court is not required to be made when suits are filed to collect accounts due a county hospital



October 24, 1955

Honorable W. C. Whitlow
Prosecuting Attorney's Office
Fulton, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"Will you please advise me if my duties as Prosecuting Attorney include the instituting of suits for the collection of unpaid accounts for the Callaway Hospital?"

"On suits for the collection of accounts filed by the Callaway County Hospital is it necessary that the Hospital put up a \$5.00 filing fee?"

In answer to your first question I enclose a copy of an opinion rendered March 5, 1953 to Curt M. Vogel, Prosecuting Attorney, Perry County, which, as you will note, specifically holds that it is the duty of the Prosecuting Attorney to institute actions to collect accounts due the county hospital, whose duty it is to render such service without fee.

In regard to the deposit in the Magistrate Court when such suits are instituted, which is your second question, I direct your attention to paragraph 1 of Section 483.615, which reads:

"1. A fee of five dollars shall be allowed the magistrate in each civil proceeding, general, or special, instituted in his court. Upon the commencement of any such proceedings in the magistrate court except in cases instituted by the state, county, or other political subdivision the party commencing the same shall pay to the clerk of said court such magistrate fee of five dollars. The

Honorable W. C. Whitlow

fees herein provided shall be charged against the losing party, and if recovered from said party the same shall be repaid to the party making the deposit of such fee."

From the above you will see that this deposit is not required where a civil suit is instituted by the state, county, or other political subdivisions. We believe that under this provision such suits as you mention would be exempt from making the deposit, since the county hospital is clearly a county institution.

In view of the above it is our opinion that in such suits as are contemplated by you that the \$5.00 deposit not be made.

CONCLUSION

It is the opinion of this department that it is the duty of the Prosecuting Attorney to institute and collect accounts due a county hospital; that the \$5.00 deposit in Magistrate Court is not required to be made when suits are filed to collect accounts due a county hospital.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/b1

TAXATION:

TAX SALE:

COUNTY COLLECTOR:

(1) A publication of notice requisite to the sale of lands for taxes directed merely to the "heirs of" a certain person which notice does not contain the names of the record owners or the names of all persons appearing on the land tax book is insufficient and would render a sale based thereon invalid. (2) When, prior to conveyance, a sale of lands for taxes is discovered to be, for any reason, invalid the purchase money and interest thereon shall be refunded to the purchaser of the county treasury. (3) The costs and expenses incurred in connection with the sale of lands for taxes which sale is later determined to be invalid cannot be charged against the purchase money in the hands of the county.

FILED

97

December 7, 1955

Honorable Robert E. Wilson
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion of this department, which request reads:

"An exceedingly complicated problem involving the sale of certain real estate for taxes by the County Collector has arisen in this County upon which I would like to have your opinion. I shall denominate the various parties involved as A, B and C. The facts are as follows:

"A originally owned 80 acres of land which were combined together into a single tract. Thereafter he married B and conveyed 60 acres of this land to B and her bodily heirs. Seven children were then born of the marriage between A and B, and A subsequently died. Administration was duly had on the 20 acres of land which remained in A's name at the time of his death, and B elected to take a child's part. The seven children were placed in various foster homes, some of them were adopted and some were not, and others have legal guardians and others do not. Then B married C and now has five children by him. Meanwhile, the County taxes on the entire 80 acres of land became several years delinquent, and the County Collector several months ago undertook to sell the entire 80 acres for taxes under the Jones-Munger Act. He published notices in the newspaper which described the entire 80 acres as a single tract, and which

Hon. Robert E. Wilson

notices were directed merely 'to A's heirs'. The entire 80 acres was sold at the first offering for a cash price of \$1100.00 and a certificate given to the purchaser by the collector. Since the taxes only amounted to around \$200.00 plus the costs, the collector deposited more than \$800.00 in surplus with the County Treasurer. Based on the above facts, I would like to present the following questions for your consideration:

"(1) Is this entire sale invalid because of the failure of the collector to give a proper notice in the publication aforesaid, because of the commingling together of the two tracts, or for any other reason? (2) If the sale is in fact invalid, how can it be undone so as to restore all the parties to status quo, and particularly with regard to the costs of the sale? (3) If the sale is invalid, what disposition should be made of the surplus funds in the hands of the County Treasurer, and also the \$200.00 plus costs retained by the collector to satisfy the taxes? (4) Might a sale based on such a publication be valid as to the 20 acre tract, but invalid as to the 60 acre tract? (5) If the sale, or any part of it, is valid, can the County Treasurer with approval of the County Court pay over any of the proceeds to any of the parties until B's death? (6) Based on your answers to the preceding questions, would it be lawful for the County Treasurer to pay the surplus funds into the Circuit Court of Polk County, Missouri, and file a suit for interpleader of the various interested parties? (7) If the previous sale is invalid, can the collector lawfully re-sell this land for taxes by advertising the two tracts separately, mentioning the name of each heir to the present tract in the separate publications and selling each tract separately, even though the owners of the sixty acre tract cannot be determined until B's death? (8) Would any person be entitled to claim the surplus from the sale of the 60 acre tract in hands of the County treasurer prior to the death of B?"

You state that the 80 acres was described as a single tract and that the notice was directed to "A's" heirs." We assume that such was not the manner in which the assessment was carried on the land tax book and we will treat first the matter of notice.

Hon. Robert E. Wilson

Section 13 of Article X of the Missouri Constitution provides that no real property shall be sold for taxes without judicial proceedings unless the notice of sale shall contain the names of all record owners thereof or the names of all owners appearing on the land tax book. Said section more fully provides as follows:

"No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof, or the names of all owners appearing on the land tax book, and all other information required by law."

Section 140.150, as amended to conform to the requirements of the above noted constitutional provisions provides as follows:

"1. All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this chapter on the fourth Monday in August of each year.

"2. No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof, or the names of all owners appearing on the land tax book and all other information required by law; provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor.

"3. The entry of record by the county collector listing the delinquent lands and lots as provided for in this chapter shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs.

It is to be noted that prior to the 1945 Constitution there was no requirement that the notice of sale of real property for delinquent taxes in a nonjudicial proceeding contain the names of the record owners or the names of the owners appearing on the land tax book. In fact such requirement was specifically negated by

Hon. Robert E. Wilson

the following language: RS1939, Sec. 11125.

"It shall not be necessary to include the name of the owner, mortgagee, occupant or any other person, corporation owning or claiming an interest in or to any of said lands or lots in the notice of sale."

Section 140.170, RSMo 1949, provides for the publication of the notice of sale as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the fourth Monday in August.

"2. In addition to the names of all record owners or the names of all owners appearing on the land tax book it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.; provided, however, that if a part or parts of any forty acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated.

"3. To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the fourth Monday in August next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered.

Hon Robert E. Wilson

"4. The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper."

It is fundamental that in construing a statutory provision relating to the sale of land for delinquent taxes such provision must be strictly construed in favor of the owner of said land. This rule is stated in 61 C.J., Sec. 1519, page 1117, as follows:

"Sales of land for delinquent taxes being in derogation of private rights of property, the power has been said to be strictis-simi juris and statutes authorizing such sales must be strictly construed in favor of the owner of such land, or in so far as they are intended for the benefit, or the protection, of the citizen, and the scope of such statutes is never enlarged beyond their actual terms."

The rule has long been recognized and applied by the appellate courts of this state, i.e. Meriwether vs. Overly, 228 Mo. 218; Schlafly vs. Baumann, 108 S.W.(2d) 363.

The following is contained in Cooley, Taxation 4th Edition, Vol. 3:

Sec. 1409, p. 2791-"A notice of sale, as required by statute is necessary to authorize a tax sale and the absence of the notice renders the sale void. This is one of the most important of all safeguards that have been deemed necessary to protect the interests of persons taxed and nothing can be substituted for it or excuse the failure to give it."

Sec. 1414, p. 2799-"Unusual care is required in obeying the directions of the statute regarding notice, or no one who is entitled to notice can be bound by a sale which has been made without it."

Hon. Robert E. Wilson

Turning more specifically to the instant facts we invite your attention to the following found in 51 Am. Jur. Taxation, Sec. 1037, page 907:

"A notice of the sale of land for taxes as the property of the 'heirs of' a deceased owner, is insufficient, in the absence of express statutory authority."

In the case of Holroid vs. Pumphrey, 15 Law Ed. 264, 18 How. 69, decided by the Supreme Court of the United States, the plaintiff brought suit to obtain possession of certain lands held by the defendant. Plaintiff claimed title under a tax sale made in the year 1846. It appeared that there has been a prior tax sale in the year 1844 in which the notice of sale listed the property as property of the "heirs of James Thomas." In regard to the 1844 sale and specifically in regard to the notice of said sale the court said:

"Our opinion is, that the sale in 1844, as the property of the 'heirs of James Thomas,' was inoperative upon the title of the plaintiff. The advertisement did not express the name of the person to whom the lot was assessed on the books of the Corporation at the time of such assessment, as was required by the Act of Congress of the 26th May, 1824, amending the city charter (4 Stats. at L. 75, section 2); nor were the taxes due for that year collected by means of its sale; at most, it was an abortive effort to do so, which failing, left the lien of the Corporation on the lot for the assessed taxes, and its legal remedies to enforce it unimpaired; * * * * *

"The Act of Congress above referred to provides for the case. It declares 'that no sale of real property, for taxes hereafter made, shall be impaired or (made) void by reason of such property not being assessed or advertised in the name or names of the lawful owner or owners thereof, provided the same shall be advertised as above directed.' We have seen that the Corporation was directed to advertise the name of the person to

Hon. Robert E. Wilson

whom the lot appeared to be assessed on the books of the Corporation."

Bearing in mind the fact that the provisions of Article X, Section 13 of the Constitution, and Section 140.150, RSMo 1949, relating to the inclusion of the name of the record owners of the names of the owners appearing on the land tax book in the notice of sale and for the benefit of the taxpayer, we are of the opinion that under the foregoing noted decision and cases authorizing a notice of sale directed merely to "A's heirs" is insufficient. It, of course, follows that a failure to comply with this mandatory condition precedent of publishing a valid notice renders the tax sale invalid as to the entire 80 acre tract.

What has heretofore been stated disposes of questions 1, 4 and 5.

Questions 2, 3 and 6, relate to what disposition should be made of the proceeds of the sale and the payment of the costs incurred in such sale.

Your attention is directed to Section 140.540, RSMo 1949, which provides as follows:

"1. Whenever the county collector shall discover prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever, invalid, he shall not convey such lands; but the purchase money and the interest thereon shall be refunded out of the county treasury to the purchaser, his representatives or assigns, on the order of the county court.

"2. Such invalid sale shall suspend for the period intervening between the date of the sale and the discovery of its invalidity the running of the statute of limitations.

"3. In such cases the county collector shall make an entry opposite to such tracts or lots in the record of certificates of purchase issued or redemption record that the same was erroneously sold, and the cause of invalidity, and such entry shall be prima facie evidence of fact therein stated. He shall notify the county clerk of such action, whose duty it shall be to make a like entry

Hon. Robert E. Wilson

upon his sale record."

This section provides that if the collector shall discover, prior to conveyance, that the sale was for any cause whatsoever invalid, the purchase money and the interest thereon shall, on order of the county court, be refunded out of the county treasury. Said section is here applicable since the sale here considered constituted the first offering and no conveyance has yet been made. In view of the express provision of this section that the purchase money and interest thereon shall be refunded to the purchaser on order of the county court we are of the opinion that an interpleader suit would not be necessary or appropriate.

The costs of printing the tax sale notice is provided for in Section 140.170, as follows:

"5. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

Said section provides that said expense shall be paid out of the county treasury and taxed as part of the costs of the sale.

Section 140.220, RSMo 1949, provides that the county clerk shall act as clerk of the sale and specifies a fee as follows:

"1. The clerk of the county court shall attend, either in person or by deputy, as the clerk of the sale of such delinquent land, and shall enter the same on a sufficient record book giving a description of the proper tract or lot, showing how much of each was sold to whom, and the price, or whether the same remains unsold.

"2. For his services as in this section provided, he shall, except in those counties having a population in excess of one hundred thousand, receive the sum of twenty-five cents on each

Hon. Robert E. Wilson

tract of land or lot sold, to become part of the costs of sale and paid by the purchaser, which fee shall include entry or recital of redemption on such record."

Said fee constitutes a cost of the sale and is to be paid by the purchaser.

Section 140.290, RSMo 1949, provides that the collector shall be entitled to a fee of .50¢ for issuing a certificate of sale. Said fee is likewise to be paid by the purchaser.

It is our opinion from the foregoing that the costs of publications would be borne by the county and would not be subject to reimbursement out of the proceeds of the sale since the sale is invalid and the purchase money is required to be refunded to the purchaser. Likewise, we are of the opinion that the fees of the two officers above mentioned could not be charged against the proceeds of the sale since such monies are to be refunded. We know of no other provision which would permit payment of said fees from other sources in the event of an invalid sale.

Lastly, you inquire whether the collector may resell this land for taxes. We know of no provision of law which would prohibit a resale of land for taxes where such lands had been sold at a sale which is later determined to be invalid. We would suggest upon resale that the 20 acre and 60 acre tracts be listed and sold separately since each particular tract is liable only for the taxes which have been assessed against it and cannot be sold for the taxes due on the other lands of the same owner or others, and that the notice of sale relating to each should contain the names of all record owners or the names of all owners appearing on the land tax book.

In view of our previous discussion relating to the validity of the tax sale here involved, we need not at this time undertake a discussion of question number 8.

CONCLUSION

Therefore, in the premises, it is the opinion of this office that:

(1) A publication of notice requisite to the sale of lands for taxes directed merely to the "heirs of" a certain person which notice does not contain the names of the record owners or the names of all

Hon. Robert E. Wilson

persons appearing on the land tax book, is insufficient and would render a sale based thereon invalid.

(2) When, prior to conveyance, a sale of lands for taxes is discovered to be, for any reason, invalid, the purchase money and interest thereon shall be refunded to the purchaser out of the county treasury.

(3) The costs and expenses incurred in connection with the sale of lands for taxes, which sale is later determined to be invalid, cannot be charged against the purchase money in the hands of the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey,

Yours very truly,

John M. Dalton
Attorney General

DDG:mw

COUNTIES:
COUNTY PARKS:
BONDED INDEBTEDNESS:
COUNTY PROPERTY:

(1) County of third class has power to issue bonds for acquisition of land for park purposes, and (2) County of third class has power to convey land acquired from proceeds of bond issue to instrumentalities of the State of Missouri for a valuable consideration.



February 11, 1955

Honorable Scott O. Wright
Prosecuting Attorney
Boone County
Boone County Courthouse
Columbia, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Please disregard my request for an opinion dated January 22, 1955 and in place thereof give me an opinion as to the two following questions, to-wit:

- "(1). Whether a county of the third class can have a bond issue to purchase land in the name of the county for parks and recreation areas.
- "(2). Whether a county of the third class can convey title to land acquired by a bond issue to a state instrumentality for valuable consideration.

"Thanking you for your prompt attention to this matter, I am"

With respect to the first question which you have proposed, your attention is directed to the following provisions found as Sections 26(b) and 26(c), Article VI, of the Constitution of Missouri:

Sec. 26(b).

"Any county, city, incorporated town or village, school district or other political corporation or subdivision of the

Honorable Scott O. Wright

state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

Sec. 26(c).

"Any county or city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an additional indebtedness for county or city purposes not to exceed five per centum of the taxable tangible property shown as provided in section 26(b)."

To implement the quoted constitutional provisions, the General Assembly has enacted what now appears as Chapter 108, RSMo 1949, providing the mechanics for the conduct of elections to test the sense of the electorate upon proposals to increase the indebtedness of counties. Found in such chapter are Sections 108.010 and 108.020, which read as follows:

Sec. 108.010

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years; provided such indebtedness shall not exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

Sec. 108.020

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness for county purposes in addition to that authorized in section 108.010 not to exceed five per cent of the taxable tangible property shown as provided in said section."

Honorable Scott O. Wright

The foregoing constitutional and statutory provisions disclose that counties of any class do have the authority to become indebted through the issuance of bonds for public county purposes. Your first question, therefore, resolves itself into the determination of whether the acquisition of land for park and recreational purposes is one for which such an indebtedness may be incurred upon an affirmative vote of the requisite number of electors.

We think that the question is to be answered in the affirmative. The use of public funds for the acquisition of park and recreational areas is recognized as being a proper expenditure, not only by the Constitution itself but also by numerous statutory enactments. For instance, Section 47, Article III of the Constitution establishes a state park fund to be expended for the acquisition and maintenance of state parks and state park property. Section 30, Article IV, of the Constitution authorizes the State Highway Commission to expend money in state parks for highways and bridges.

As more nearly applicable to the question you have proposed, we direct your attention to the provisions of Section 64.450, RSMo 1949, relating to all counties in the State of Missouri. It reads as follows:

"County courts in all counties in the state of Missouri may set aside five per cent of the county revenue fund for the purchase of county parks and the maintenance thereof. Titles to land purchased shall be taken in the name of the county, and each court is authorized to set aside a sufficient amount each year for the maintenance of said parks when purchased."

Certainly this legislative enactment, although only providing for a limited source of funds for park purposes, does amount to a recognition of such expenditures being ones for a valid public county purpose. Many other statutes found relating to counties of classes one and two with respect to parks, and others relating to public reservation districts, while not directly applicable to Boone County which is one of the third class, yet clearly evidence the public nature of parks and recreation areas.

Your second question involves the authority of a county of the third class to sell and convey, for a valuable consideration,

Honorable Scott O. Wright

real property owned by such county. You have referred to "land acquired by bond issue." However, we do not believe the source of funds used for acquiring real property to be determinative of the right of the county to thereafter convey such real property. It is our thought that the power of the county, acting through its county court in such regard, is governed by Sections 49.270 and 49.280, RSMo 1949. They read as follows:

Sec. 49.270

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Sec. 49.280

"The county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to their county; and the deed of such commissioner, under his proper hand and seal, for and in behalf of such county, duly acknowledged and recorded, shall be sufficient to convey to the purchaser all the right, title, interest and estate which the county may then have in or to the premises so conveyed."

Your question indicates that it is proposed to convey the real property of the county to a state instrumentality for a valuable consideration. We are further advised that such state instrumentality will thereafter undertake to improve and maintain such real property for the precise purpose for which it will be acquired by the county. In other words, a distinct benefit will accrue not only to the citizens of the particular county wherein the park and recreational area is situated, but that, through the larger funds which will be made available for further improvement and maintenance of such facilities as a result of its being owned by a state instrumentality, such benefits will be enjoyed by citizens of many other counties.

Honorable Scott O. Wright

One word of caution must be given, however, in connection with the conveyance of such real property: It must always be remembered that in dealing with county property, the county court acts in a fiduciary capacity with limited powers and subject to the limitations that such dealings must be those of careful and prudent businessmen. This becomes of importance in determining the validity of any proposed conveyance of not only the real property referred to in your letter of inquiry, but with respect to any other county property.

The general rules applicable, both to the power of the county court in regard to county property, and to the limitations imposed upon the exercise of such power, are concisely summed up in *Butler County v. Campbell*, reported 182 S.W.2d 589, from which we quote:

" * * * The allegations do not concern transactions between private individuals, but rather the acts of public officers in the discharge of their official duties in dealing with the real estate and capital school fund of the county. Under the laws of this state, the county court is vested with full power and authority to control and manage the real and personal property of the county and, 'for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county.' Sec. 2480, R.S. 1939, Mo.R.S.A. In directing how this power and authority shall be exercised, the statutes provide that 'the county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to their county.' Sec. 13784, R.S. 1939, Mo.R.S.A. It is apparent that 'county courts are constituted the guardians of the property interests of their respective counties. "They occupy a position of trust" in that respect, "and in that relation are bound to the same measures of good faith towards the counties which is required of an ordinary trustee towards his cestui que trust, or an agent towards his principal.' *State ex rel. Garland County v. Baxter*, 50 Ark. 447, 8 S.W. 188, 190; *Willard v. Comstock*, 58 Wis. 565, 17 N.W. 401, 406, 46 Am. Rep. 657. 'County courts are * * * the agents

Honorable Scott O. Wright

of the county, with no powers except what are granted, defined, and limited by law; and, like all other agents, they must pursue their authority, and act within the scope of their powers.' State ex rel. Quincy, Mo. & Pac. R. Co. v. Harris, 96 Mo. 29, 37, 8 S.W. 794, 795. The county courts act for the counties in relation to funds held in trust for public school purposes. Secs. 10376, 10378, and 10384, R.S. 1939, Mo.R.S.A.; Montgomery County v. Auchley, 103 Mo. 492, 502, 15 S.W. 626. The members of the court, as public officers, do not act as individuals with relation to their own property, but as special trustees with limited authority. Saline County v. Thorp, 337 Mo. 1140, 88 S.W.2d 183, 186. They are required to act with reasonable skill and diligence and to discharge their duties with that prudence, caution and attention which careful men usually exercise in the management of their own affairs. * * *

CONCLUSION

In the premises, we are of the opinion:

(1) That a county of the third class may lawfully become indebted, through the issuance of general obligation bonds of such county within the limits and in accordance with the elective requirements of the Constitution and statutes, for the purpose of acquiring real property to be used as a park and recreational area; and

(2) That real property so acquired may thereafter be conveyed for a valuable consideration to an instrumentality of the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

John M. Dalton
Attorney General

WFB/vtl

CRIMINAL LAW:)	Griminal cases pending in Circuit Court
REPEAL OF RSMo 1949)	charging defendants with larceny, embez-
CRIMINAL STATUTES:)	zlement, and obtaining money under false
SENATE BILL NO. 27)	pretenses under RSMo 1949, in effect
68th GENERAL ASSEMBLY:)	at time crimes were alleged to be com-
PROCEDURE:)	mitted, but repealed by Senate Bill No. 27
)	of the 68th General Assembly giving new
)	definitions of said offenses. Cases

shall be tried on charges filed under RSMo 1949. If punishment for such crimes is less under Senate Bill No. 27 than under RSMo 1949, each defendant convicted before effective date of bill on August 29, 1955, but judgment not rendered until subsequently, said judgment shall be in accordance with applicable provisions of bill.

July 27, 1955

Honorable James Woodfill
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

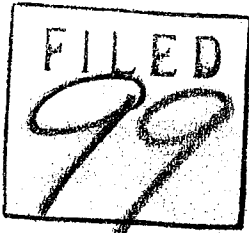
This department is in receipt of your request for a legal opinion, reading in part as follows:

"I understand that recently the several Missouri statutes concerning Larceny, Embezzlement and obtaining money under false pretenses were repealed, and there was enacted in lieu thereof, one general statute covering all three offenses.

"I have at present several cases pending on which prosecution was based on the repealed statutes. The statutes were in effect on the date of the alleged offenses and also on the date when the informations were filed; but, of course, will not be on the date when the cases are set for trial.

"I would like an opinion from your office on the following question:

"Should the prosecution of these cases proceed under the repealed statutes which were in effect when the offenses were committed, or should they be made to conform to the newly enacted statutes?"



Honorable James Woodfill

Section 1.160 and 1.180 RSMo 1949 are upon the subject of statutory construction, and we desire to call your attention to them in this connection. Section 1.160 reads as follows:

"No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision shall be repealed or amended, shall be affected by such repeal or amendment, but the trial and punishment of all such offenses, and the recovery of such fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except that all such proceedings shall be conducted according to existing laws; provided, that if the penalty or punishment for any offense be reduced or lessened by any alteration of the law creating the offense, such penalty or punishment shall be assessed according to the amendatory law."

Section 1.180 reads as follows:

"No action, plea, prosecution, civil or criminal, pending at the time any statutory provisions shall be repealed, shall be affected by such repeal; but the same shall proceed, in all respects, as if such statutory provisions had not been repealed, except that all such proceedings had after the time of taking effect of the revised statutes shall be conducted according to the provisions of such statute, and shall be in all respects subject to the provisions thereof, so far as they are applicable."

Statutes substantially the same as the sections quoted above have been in force in Missouri for many years, as will be seen from a citation of authority given in the case of Ex Parte Wilson, 330 Mo. 230. In this case the court cited another case reported in 14 Mo. in which a law similar to that quoted above was involved.

In the Wilson case, the petitioner requested the Supreme Court to issue a Writ of Habeas Corpus so that petitioner might be released from the State Penitentiary, where he had been committed under the judgment of the Circuit Court of Montgomery County. Said petitioner had been convicted of the crime of receiving a deposit of \$100.00 in the Peoples

Honorable James Woodfill

Savings Bank of Bowling Green, when as assistant cashier and director of such bank, he knew it to be insolvent. He was prosecuted under an indictment drawn under Section 4416 RSMo 1929, defining above mentioned criminal offense. This section was repealed by an act of the Legislature which became effective upon September 14, 1931, although the court did not render judgment against said petitioner until November 2, 1931.

In his motion for new trial, petitioner contended that Section 4416, resulted in a reduction of the offense of which he had been convicted within the meaning of Section 4468, and that the trial court was unauthorized to assess any punishment, and to render judgment against him, since such statute had been repealed. He further contended the section was unconstitutional and denied him equal protection of the law, in violation of Section 1, Amendment 14 of the Constitution of the United States. In discussing these contentions the court said at 1, c, 233, 234, and 235:

"(1). There is nothing in Section 4468 to indicate such legislative intent, and it cannot be so interpreted. The general provision of this section, written in clear and unmistakable language, is that the repeal or amendment of a statute which creates an offense shall not affect the prosecution or the punishment of offenders for offenses committed prior to such repeal or amendment. And the meaning of the exception to the general provision is equally clear when the exception is considered in connection with the general provision; that is, that any offender against the criminal laws of this State shall have the benefits of any reduction in the punishment prescribed for the offense by an amendment of the law creating the offense which becomes effective after the commission of the offense but before the entry of judgment and sentence. Indeed, if Section 4468 should be given the construction for which the petitioner contends, the general provision thereof would be meaningless and would serve no purpose.

"(2). Moreover, Section 4468 must be construed in connection with Sections 661 and 662, Revised Statutes 1929, which reads as follows:

'Sec. 661. No offense committed, and no fine, penalty or forfeiture incurred previous to the time when any statutory provision

Honorable James Woodfill

shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses, and the recovery of such fines, penalties and forfeiture, shall be had, in all respects, as if the provisions had remained in force.

'Sec. 662. No action, plea, prosecution, civil or criminal, pending at the time any statutory provisions shall be repealed, shall be affected by such repeal; but the same shall proceed, in all respects, as if such statutory provisions had not been repealed, except that all such proceedings had after the time of taking effect of the Revised Statutes shall be conducted according to the provisions of such statute, and shall be in all respects subject to the provisions thereof, so far as they are applicable.'

"These saving clauses, in so far as they relate to statutory offenses, have been upheld by this court in numerous decisions. (State v. Mathews, 14 Mo. 101; State v. Ross, 49 Mo. 416; State ex rel. v. Willis, 66 Mo. 131; State v. Proctor, 90 Mo. 334, 2 S.W. 472.) And we are supported in our construction of Section 4468 by the holding in State v. Walker, 221 Mo. 511, 120 S.W. 1198, wherein it was said: 'Appellant's position that the occurrence of the local option election prior to the trial sufficed to prevent a conviction, because the dramshop act under which defendant was tried was not in force in the county at the time of the trial, might be well taken, but for the provision of section 2392 of the Revised Statutes of 1899 (now Sec. 4468, R.S. 1929). This section says no offense committed and no fine, penalty or forfeiture, or prosecution commenced or pending previous to or at the time when any statutory provision shall be repealed or amended, shall be affected by such repeal or amendment, but the trial and punishment of all such offenses, and the recovery of such fines, penalties or forfeitures, shall be had as if it had not been repealed or amended. There is a further provision in the clause that if the punishment or penalty for any offense is reduced or lessened after commission of the offense and before the trial of the offender, by alternation of the law creating the offense, such penalty or punishment shall

1

Honorable James Woodfill

be assessed according to the amended law. Such a general statute has been held to save indictments drawn on a statute which is afterwards repealed. (Mullinix v. People, 76 Ill. 211) . . . We think the Dramshop Law, though it remains in force to regulate existing licenses, is repealed by the adoption of prohibition at an election held under the Local Option statute; that is, repealed in such sense as to bring into operation the saving clause of Section 2392 (now Sec. 4468) permitting indictments and informations theretofore found for infractions of the Dramshop Law, to be prosecuted and the delinquents punished.'

* * * * *

"The result of our construction of Section 4468 is to subject all offenders against any statute of this State to the punishment prescribed for the offense at the time it was committed, although the statute creating the offense is repealed before the entry of judgment and sentence, and to give all offenders against any criminal law of this State the benefit of any reduction in the punishment prescribed for the offense by an amendment of the law creating the offense before the entry of judgment and sentence. Thus it is seen that Section 4468, as we construe it, affects all offenders similarly situated and of the same class alike, and does not subject any offender to an arbitrary exercise of the powers of government. And, as we read and understand the authorities quoted above, Section 4468, when so construed, does not deny to the petitioner the equal protection of the laws, within the meaning of Section 1 of Amendment XIV of the Constitution of the United States."

It appears that the law and facts involved in the Wilson case are very similar to those now under consideration and that such decision is in point with the question raised in above inquiry. For example, Section 4468 RSMo 1929 is now Section 1.160 RSMo 1949, and Section 662 RSMo 1929, also referred to in such case, is now Section 1.180 RSMo 1949. Again it will be seen that the facts are very similar to the present statement of facts in that the law under which both defendants were charged with criminal offenses has been repealed.

Honorable James Woodfill

Sections 560.155, 560.160, 560.165, 560.170, 560.185, 560.195, 560.200, 560.215, 560.235, 560.245, RSMo 1949, define the offenses of all classes of grand and petit larceny. Sections 560.250, 560.255, 560.260, 560.265, 560.270, and 560.280, RSMo 1949, define all classes of embezzlement and Section 561.370 RSMo 1949, defines the offense of obtaining money or property under false pretenses. All of the above mentioned sections of the 1949 statutes have been repealed by Senate Bill No. 27 of the 68th General Assembly, and five new sections defining said offenses have been enacted.

The 68th General Assembly was officially adjourned May 31, 1955, and under the provisions of Art. III, Section 29, Constitution of Missouri 1945, all bills which have passed both houses shall become effective ninety days after the adjournment date of the General Assembly, consequently, Senate Bill No. 27 (passed by both houses) will become effective as a law upon August 29, 1955. The criminal prosecutions referred to in the opinion request are apparently founded upon indictments or informations charging the crimes of larceny, embezzlement and obtaining money under false pretenses, drawn under the sections of the 1949 statutes defining the offenses. These are the sections which have been repealed by Senate Bill No. 27 and the crimes alleged are said to have been committed before the repeal of the law.

It is noted that Sections 1.160 and 1.180, supra, contain what has been referred to as "saving clauses," that is, in effect, they permit one to be prosecuted, under a repealed criminal statute in the same manner as if the law had not been repealed, when the criminal violation charged in the indictment or information is alleged to have been committed during the time the repealed statute was in effect.

The 1949 statutes which were repealed by said senate bill will continue in force until the effective date of said bill upon August 29, 1955. Therefore, those criminal cases now pending in the circuit court of your county based upon the repealed 1949 statutes, will be tried on the charges filed under the provisions of said repealed statutes. When such cases have been tried before August 29, 1955, and each defendant found guilty is not sentenced and judgment is not to be rendered until after said date, the procedure to be followed in that instance shall be that when the punishment fixed for such criminal offense is less under Senate Bill No. 27, than under the 1949 statutes, the sentence and judgment imposed by the trial court shall be in accordance with the provisions of said senate bill rather than the 1949 statutes.

Honorable James Woodfill

CONCLUSION

It is therefore the opinion of this department, that criminal cases pending in circuit court charging the defendants respectively with the offenses of larceny, embezzlement, and obtaining money under false pretenses under the provisions of the Revised Statutes of Missouri for 1949, in effect at the time the offenses are alleged to have been committed, but since repealed by Senate Bill No. 27, of the 68th General Assembly, which gives new definitions of such offenses, such cases will be tried on the charges filed under the provisions of the Revised Statutes of Missouri for 1949, relating thereto. However, if the punishment provided for larceny, embezzlement, or obtaining money under false pretenses is less under the provisions of Senate Bill No. 27 than under those of the 1949 statutes, then each defendant convicted of any such offense or offenses, and judgment is not rendered against him until after August 29, 1955, the effective date of said Senate Bill No. 27, such judgment shall be in accordance with the applicable provisions of said bill.

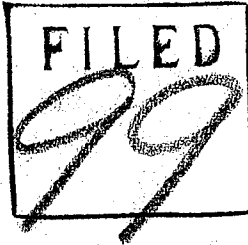
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul W. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:ma:gm

VOTER REGISTRATION: Persons who are registered prior to July 1, 1955, in cities covered by Senate Bill No. 297 are not obliged to reregister by Section 116.040, RSMo 1949.



August 3, 1955

Honorable Scott O. Wright
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

Your request for an opinion reads as follows:

"This office would be very grateful to you if you would render us an opinion on the following question:

"Under Senate Bill No. 297, do persons who were registered prior to July 1, 1955, in cities covered by this Bill have to reregister in accordance with Section 116.040, R.S. Mo. 1949, if they were registered prior to July 1, 1955, under Section 115.070, R.S. Mo. 1949, which section has been repealed by Senate Bill No. 297?"

Senate Bill No. 297, which was passed by both Houses of the General Assembly and signed by the Governor on June 29, 1955, will go into effect on the 29th of August, 1955. The provisions of this bill are as follows:

"Section 1. Sections 114.010 to 114.270, being all of chapter 114, sections 115.010 to 115.180, being all of chapter 115, and section 116.010, RSMo 1949, are repealed and one new section enacted in lieu thereof, to be known as section 116.010, to read as follows:

"116.010. There shall be a registration of qualified voters under the provisions of this chapter in every city containing at least ten thousand inhabitants located in any county not having a provision for registration of voters. The registration shall

Honorable Scott O. Wright

be held at the office of the county clerk except in cities in which the county clerk has no office where the registration shall be held in the office of the city clerk who shall be furnished with the necessary supplies. The registration shall be held within the hours of eight-thirty a.m. and five p.m. After so registering, a qualified voter shall not be required to register again unless obliged to do so by the terms of this chapter. The registration of any voter may be changed, canceled or transferred only as provided in this chapter. No voter who has registered in any city prior to July 1, 1955, shall be required to register under this section unless obliged to do so by other sections."

The first sentence of this bill would seem to provide that in every city of over ten thousand, not having provision for registration of voters, there would have to be a registration of qualified voters according to other sections of Chapter 116, RSMo 1949, Cum. Supp. 1953, whether such persons had registered before or not; but the last sentence of this bill clearly refutes this idea and states that no voter who has registered in any city prior to July 1, 1955, shall be required to register under this section, unless obliged to do so by other sections of this Chapter (being Chapter 116).

Your question is whether Section 116.040, RSMo 1949, comes within the phrase "unless obliged to do so by other sections of this chapter."

Section 116.040 reads as follows:

"1. Each person who shall offer to register under this chapter shall appear at the office of the county clerk within the time and hours herein stated. Such persons shall answer truthfully all questions as to identity, residence and qualifications called for by the registration records required by this chapter. There shall be provided by the county clerk three sheets or cards for the registration of each voter. Said cards or sheets shall be adapted for use in loose leaf or card registration binders. One of said sheets or cards

Honorable Scott O. Wright

provided for each voter shall be tinted pink, one blue and another white. Said cards or sheets shall contain the following information:

Name
Address
Street and No.
Location of Resident's place of
birth
Color Sex Age
Occupation
Term of Residence
. State County
. Precinct
Naturalized - Court in which Naturalized -
Sworn (Yes or No)
Remarks;

Voter's Signature

.

"On each registration sheet, and below the elector's signature, shall be the following form, which shall be kept by the judges of election:

Election Date	Registration Number	Voted	Rejected	Remarks
------------------	------------------------	-------	----------	---------

"At the time of registration, and after supplying the information called for on said registration records, each person shall write his full name on each of the three registration records and shall, at the same time, take the

Honorable Scott O. Wright

following oath, which shall be inscribed above his or her signature on each sheet, as follows:

AFFIDAVIT OF REGISTRATION

"The undersigned affiant, being duly sworn, says:

'I hereby swear (or affirm) that the statements made herein are true and that on or before the next ensuing primary or election I will be at least twenty-one years of age, and that I am or will be, on said date, a qualified elector in the city of _____.'

"2. If any applicant is unable to sign his name, the application for registration shall be written for him and the affidavit of registration shall include, under 'Remarks,' the date of birth, the height in feet and inches, color of eyes and any distinguishing marks. He shall then sign the application for registration and affidavit by making his mark in the usual manner."

Section 116.040, RSMo 1949, has to do only with method of registration of those required to register under Chapter 116. It does not obligate anywhere therein any person to register or reregister. Therefore, it is the opinion of this office that those persons living in cities covered by Senate Bill No. 297 and registered prior to July 1, 1955, under Section 115.070, RSMo 1949, which section was repealed by Senate Bill No. 297, are not obliged to reregister by Section 116.040, RSMo 1949.

Section 116.070, RSMo 1949, provides for the reregistering of persons if they change their name or address within the city, and Section 116.080, RSMo 1949, provides for the reinstatement of registration by voter who has not voted in the last two general elections. Those persons coming within these two sections are the persons meant to come within the phrase "unless obliged to do so by other sections of this chapter" contained in Senate Bill No. 297.

CONCLUSION

It is the opinion of this office that persons who are registered prior to July 1, 1955, in cities covered by Senate

Honorable Scott O. Wright

Bill No. 297 are not required to reregister by Section 116.040,
RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, Harold L. Volkmer.

Yours very truly,

JOHN M. DALTON
Attorney General

HLV:ml

INSANE PERSONS: Subparagraph 3, Section 7, S.B. No. 59, 68th General Assembly provides mechanics for extending proceeding for temporary, emergency confinement under Secs. 5 or 6 of Act into formal judicial proceeding for involuntary hospitalization under Sec. 3 of Act. Court appointing examining physicians under Sec. 3 of Act may appoint physicians of own choosing except when patient confined in municipal hospital, when physicians must be members of staff of municipal hospital. Act contains no provision authorizing state hospital to condition giving of voluntary hospitalization to indigent persons only after hearing and commitment. Line 3, Sec. 8 of Act should be so read as to employ punctuation by use of a comma immediately after the word "court" appearing therein.

September 26, 1955

Honorable Scott O. Wright
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Sir:

This opinion is rendered in reply to your recent request in which you enclosed the letter of inquiry addressed to you by the Honorable Howard B. Lang, Judge of the Probate Court of Boone County. For the purpose of addressing replies to questions posed in Judge Lang's letter, we quote the same in full as follows:

"Senate Bill No. 59, which becomes effective law on the 29th of this month:- Page 9 of the bill, being subsection 3 of Section 7 contains the following:

"If the proceeding under section 3 is instituted within the five-day period, the court shall hold the hearing therein provided for within ten days thereafter and shall order that all preliminary acts required by section 3 be performed before the hearing."

"Page 3, Section 3, subsection 3 provides that after the commencement of proceedings the court shall appoint two licensed physicians to examine the proposed patient and report their findings as to the mental condition, and if the report is to the effect that the patient is mentally ill then the court is to fix a date for hearing, - subsection 5, - etc.

Honorable Scott O. Wright

"In the first place, if three physicians report to the court that the patient is mentally ill, the hearing would seem rather superfluous so far as additional medical testimony would be concerned, - though it does give the patient the right to appear and to be represented by counsel, etc., which would be his constitutional privilege.

"But suppose the patient is already in the hospital before hearing is set, under the provisions of subsection 3 of Section 7, above quoted, is it required that we send two physicians over to the hospital to examine him and report, or that we employ two Fulton physicians to go to the hospital for examination and report? Considering the number of patients from Boone County, that would be expensive business, if, indeed, we could secure the services of Columbia or Fulton physicians for such trips away from their own busy offices.

"Subsection 3 of section 3, page 3, contains this language:

"'except that if the person is confined in a municipal hospital and is indigent, the examining physicians shall be members of the staff of the municipal hospital.'

"If this phrase is ruled to intend also physicians of the State Hospital (which, like the municipal hospital is a tax supported institution,) it would make the procedure much more practicable, inasmuch as the patient, under this arrangement, is already in the institution. Otherwise, if the requirement be that we would have to send Columbia physicians over to Fulton to make examination and report, it is practically unworkable at all.

"Besides, who would be more competent to give an opinion as to mental condition than the hospital staff physicians?

Honorable Scott O. Wright

"There are other sections of this new law which present difficulties in administration, but just now we need advice from the Attorney General as to just what is included by the phrase in subsection 3 of section 7, 'shall order that all preliminary acts required by section 3 be performed before the hearing.'

"In the white sheet sent out by the Division of Mental Diseases, at the bottom thereof, we find 'Except in case of indigency payment for care * * * will be required upon admission to hospital.' This is the blank for voluntary hospitalization.

"Question: Will the indigent be granted 'voluntary hospitalization'? - without hearing or commitment?

"Section 8, subsection 1, line 3: should there be a comma after 'county court'? If so, it would mean the county court, except in City of St. Louis or class one county, would provide for transportation, - and in St. Louis or class one counties, the probate court would do so. As it is now, I can't tell what is meant.

"As I understand, 'voluntary hospitalization' will be granted upon application, payment for 30 days and a bond guaranteeing future payments, and the certificate of one physician; - in which case no action will be taken by the probate court in the matter. - Is this correct?

"Inasmuch as this law becomes effective August 29th, and we have several cases pending right now, we would appreciate prompt attention to this request for clarification."

Inquiries to be answered in this opinion bring into consideration Sections 3, 5, 6, 7, 8, 17 and 27 of Senate Bill No. 59, passed by the 68th General Assembly of Missouri, and we quote at this point Sections 3, 5, 6, 7 and 8, as follows:

Honorable Scott O. Wright

"Section 3. 1. Proceedings for the involuntary hospitalization of an individual may be commenced by the filing of a written application with the probate court by a friend, relative, spouse, or guardian of the individual, or by a licensed physician, a health or public welfare officer, or the head of any public or private institution in which such individual may be. Any such application shall be accompanied by a certificate of a licensed physician stating that he has examined the individual and is of the opinion that the individual is mentally ill and should be hospitalized or a written statement by the applicant that the individual has refused to submit to examination by a licensed physician.

"2. Upon receipt of an application the court shall give notice thereof to the proposed patient, and to his legal guardian or, if he has no legal guardian, to his spouse, parent or nearest known relative or friend.

"3. As soon as practicable after notice of the commencement of proceedings is given the court shall appoint and shall fix a reasonable compensation for two licensed physicians to examine the proposed patient and report to the court their findings as to the mental condition of the proposed patient and his need for custody, care, or treatment in a mental hospital, except that if the person is confined in a municipal hospital and is indigent, the examining physicians shall be members of the staff of the municipal hospital."

"4. The examination shall be held at a hospital or other medical facility, at the home of the proposed patient, or at any other suitable place not likely to have a harmful effect on his health.

"5. If the report of the two licensed physicians is to the effect that the proposed patient is not mentally ill, the court without taking any further action may terminate the proceedings and dismiss

Honorable Scott O. Wright

the application; otherwise, it shall forthwith fix a date for and give notice of a hearing to be held not less than five nor more than fifteen days from receipt of the report.

"6. The proposed patient, the applicant, and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses, and the court in its discretion may receive the testimony of any other person. The proposed patient shall not be required to be present, and all persons not necessary for the conduct of the proceedings shall be excluded, except as the court may admit persons having a legitimate interest in the proceedings. The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered and shall not be bound by the rules of evidence. An opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither he nor others provide counsel, the court shall appoint counsel.

"7. If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient is mentally ill, and is in need of custody, care or treatment in a mental hospital and, because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization, it shall order his hospitalization for an indeterminate period or for a temporary observational period not exceeding six months; otherwise it shall dismiss the proceedings. If the order is for a temporary period the court at any time prior to the expiration of such period, on the basis of report by the head of the hospital and such further inquiry as it may deem appropriate, may order indeterminate hospitalization of the patient or dismissal of the proceedings.

Honorable Scott Q. Wright

"8. The order of hospitalization shall state whether the individual shall be detained for an indeterminate or for a temporary period and if for a temporary period, then for how long.

"9. The court is authorized to appoint a special commissioner to assist in the conduct of hospitalization proceedings. In any case in which the court refers an application to the commissioner, the commissioner shall cause the proposed patient to be examined promptly and on the basis thereof shall either recommend dismissal of the application or hold a hearing as provided in this section and make recommendations to the court regarding the hospitalization of the proposed patient.

"10. No person who is being treated by prayer in the practice of the religion of any church which teaches reliance on spiritual means alone for healing, may be ordered detained or committed under the provisions of this chapter unless substantial evidence is produced upon which the court finds in addition to the other findings required by this act, that he is or would likely become dangerous to himself, or to the person or property of others, or unless he or his legal guardian, if any, consent to such detention or commitment. This chapter does not authorize any form of compulsory medical treatment of any person who is being treated by prayer in the practice of the religion of any church which teaches reliance on spiritual means alone for healing.

"11. Nothing in this Section will be construed to prohibit the temporary emergency treatment of any person who is acting or appears to be immediately about to act in such a manner as to endanger the person, lives, or property of himself or others, or both.

"Section 5. 1. Any individual may be admitted for temporary confinement to a hospital upon:

"(1) Written application to the hospital by any health or police officer or any other person stating his belief that the individual is likely

Honorable Scott O. Wright

to cause injury to himself or others if not immediately restrained, and the grounds for such belief; and

"(2) A certification by at least one licensed physician that he has examined the individual and is of the opinion that the individual is mentally ill and, because of his illness, is likely to injure himself or others if not immediately restrained.

"2. An individual with respect to whom such a certificate has been issued may not be admitted on the basis thereof at any time after the expiration of three days after the date of examination.

"3. Such a certificate, upon indorsement for such purpose by a judge of any court of record of the county in which the individual is present, shall authorize any health or police officer to take the individual into custody and transport him to a hospital as designated in the application.

"Section 6. 1. Any health or police officer may take an individual into custody, apply to a hospital for his admission and transport him thereto for temporary confinement if such officer has reason to believe that;

"(1) the individual is mentally ill and, because of his illness is likely to injure himself or others if allowed to be at liberty pending examination and certification by a licensed physician; or

"(2) the individual, who has been certified under Section 5 as likely to injure himself or others, cannot be allowed to remain at liberty pending the indorsement of the certificate as provided in that section.

"2. The application for admission shall state the circumstances under which the individual was taken into custody and the reason for the officer's belief.

Honorable Scott O. Wright

"Section 7. 1. Within five days after the admission of any person under the provisions of sections 5, or 6 the head of the hospital shall notify the probate court of the county of residence of such patient. Such notification shall contain the full name of the patient, his address, manner of admission, the name of his next of kin, spouse or guardian, and such other information concerning the patient as may be necessary.

"2. Upon receipt of the notice the judge shall note it on his docket and if no proceeding is instituted under section 3 by any person authorized to do so within five days, he shall order the patient's release. The head of the hospital upon receipt of the order of release shall release the patient immediately.

"3. If the proceeding under section 3 is instituted within the five-day period, the court shall hold the hearing therein provided for within ten days thereafter and shall order that all preliminary acts required by section 3 be performed before the hearing. The court may order the temporary confinement continued until the rendition of judgment in the proceeding, but the judgment shall be rendered not later than five days after the end of the hearing.

"Section 8. 1. Whenever an individual is about to be hospitalized under the provisions of sections 3, 4, 5 or 6, the county court or the probate court if the individual is a resident of the City of St. Louis or a class one county, upon the request of a person having a proper interest in the individual's hospitalization, and if the court finds that the individual is entitled to be hospitalized as a county patient, or that such action is necessary for the individual's physical and mental health, shall arrange for the individual's transportation to the hospital with suitable medical or nursing attendants and by such means as may be suitable for his medical condition. Whenever practicable, the individual to be hospitalized shall be accompanied by one or more of his friends or relatives.

Honorable Scott O. Wright

"2. Pending his removal to a hospital, a patient taken into custody or ordered to be hospitalized pursuant to this act may be detained in his home, a licensed foster home, or any other suitable facility under such reasonable conditions as the probate judge may fix, but the patient, except because of and during an extreme emergency, shall not be detained in a nonmedical facility used for the detention of individuals charged with or convicted of penal offenses. Reasonable measures, including provision for medical care, as may be necessary to assure proper care of an individual temporarily detained pursuant to this section shall be taken."

The first pointed question to which this opinion is addressed is found on page two of Judge Lang's letter of August 20, 1955, and we quote such portion of the inquiry as follows:

"There are other sections of this new law which present difficulties in administration, but just now we need advice from the Attorney General as to just what is included by the phrase in subsection 3 of section 7, 'shall order that all preliminary acts required by section 3 be performed before the hearing.'"

Section 7 of the Act is concerned with admissions under Sections 5 or 6 of the Act, which sections relate solely to temporary, emergency confinement in a hospital. Section 3 of the Act must be viewed as the formal judicial proceeding for involuntary hospitalization, not of an emergency nature, and referred to in Section 2 of the Act as a procedure for "(1) Hospitalization on court order, judicial procedure." Under Section 7 of the Act, when temporary, emergency confinement has been effected under either Section 5 or 6 of the Act, we find that the hospital is allowed five days to notify the probate court of the county of residence of the patient confined. On receipt of such notice the probate judge makes a docket entry of having received such notice. If no person has instituted a formal judicial proceeding for involuntary hospitalization under Section 3 of the Act within five days after docketing the notice, the probate judge is obliged to order the patient's release from temporary, emergency confinement effected under Sections 5 or 6 of the Act.

Honorable Scott O. Wright

We now come to a consideration of subparagraph 3 of Section 7 of the Act. This subparagraph 3 comes into play only in the event that a formal judicial proceeding for involuntary hospitalization under Section 3 of the Act has been instituted subsequent to temporary, emergency confinement. At this point we observe the necessity for the following language directed to the probate court and found in subparagraph 3 of Section 7 of the Act:

"If the proceeding under section 3 is instituted within the five-day period, the court shall hold the hearing therein provided for within ten days thereafter and shall order that all preliminary acts required by section 3 be performed before the hearing." *

(Emphasis added.)

By incorporating the above quoted provision in Section 7 of the Act, the mechanics for extending a proceeding for temporary, emergency confinement under Sections 5 or 6 of the Act, into a formal judicial proceeding for involuntary hospitalization under Section 3 of the Act becomes obvious.

Having disclosed the purpose of subparagraph 3 of Section 7 of the Act, we feel that consideration should next be given to the following question appearing on page one of Judge Lang's letter:

"But suppose the patient is already in the hospital before hearing is set, under the provisions of sub-section 3 of Section 7, above quoted, is it required that we send two physicians over to the hospital to examine him and report, or that we employ two Fulton physicians to go to the hospital for examination and report?"

A reading of Section 7 of the Act will disclose that the only instance when a patient will be in the hospital at the time a hearing is had under subparagraph 3 of said Section 7, is when he is there by reason of temporary, emergency hospitalization under Sections 5 or 6 of the Act. To find the directive which the probate court is to follow with reference to physical examination of the person about to be proceeded against by formal proceedings outlined in Section 3 of the Act, we must examine subparagraphs 3, 4 and 5 of Section 3.

Before proceedings initiated under Section 3 of the Act even reach the court, the person or persons responsible for initiating the same must append to the application a certificate

Honorable Scott O. Wright

of a licensed physician stating that he has examined the individual, and such examination is not initiated by the court. After proceedings are filed in the court under Section 3 of the Act, we find that subparagraphs 3, 4 and 5 of Section 3 deal with the appointment of two licensed physicians by the court to examine the person proceeded against, and nothing contained therein discloses that the court may not appoint qualified physicians of its own choosing, without regard to their being residents of the county where the proceeding has been instituted. However, in the single instance where the person proceeded against is confined in a municipal hospital and is indigent, the examining physicians appointed must be members of the staff of the municipal hospital. The Act does not contain a similar provision relative to appointment of examining physicians when the person proceeded against is confined in a State maintained hospital, but the reason is quite obvious when we consider that the State maintained hospital is adequately staffed with qualified physicians who can make such examinations by appointment of the court where the proceedings are instituted. We conclude that the court appointing examining physicians under Section 3 of the Act is limited only by the language appearing in subparagraph 3 of Section 3 which provides:

"* * * except that if the person is confined in a municipal hospital and is indigent, the examining physicians shall be members of the staff of the municipal hospital."

The next question to be considered is found on page two of Judge Lang's letter in the following language:

"Will the indigent be granted 'voluntary hospitalization'?-without hearing or commitment?"

The admission of voluntary patients to a private or public hospital is authorized by Section 17 of the Act, which provides:

"Section 17. The head of a private hospital may and the head of a public hospital, subject except in case of medical emergency to the availability of suitable accommodations, shall admit for observation, diagnosis, care, and treatment any individual who is mentally ill or has symptoms of mental illness and who, being sixteen years of age or over, applies therefor, and any individual under sixteen

Honorable Scott O. Wright

years of age who is mentally ill or has symptoms of mental illness, if his parent or legal guardian applies therefor in his behalf."

Section 17 of the Act, quoted above, does not make any distinction between indigent persons and those able to pay for hospitalization, but we do direct attention to Section 27 of the Act which classifies patients as "private patients" or as "county patients." Subparagraph 3 of Section 27, provides as follows:

"3. If any person is admitted to a state hospital who is unable to pay for care and treatment, the superintendent of the hospital shall notify the county court of the county of residence of the fact and the county court shall hold a hearing on the case within ten days following the notification. If it is determined at the hearing that the person is unable to pay for care and treatment the county court shall order the hospitalization of the person as a county patient. Appeals from the decision of the county court may be taken in the manner provided in sections 49.230 to 49.250, RSMo."

We find no provision in Senate Bill No. 59 which would authorize a state hospital to condition the giving of voluntary hospitalization to indigent persons under Section 17 of the Act only after hearing and commitment, and such state hospital can only look to the procedure set forth in subparagraphs 3, 4 and 5 of Section 27 of the Act for reimbursement for treatment and care given to such indigent person who has been accepted by a state hospital for treatment under authority found in Section 17 of the Act. Of course, under Section 17, just referred to, a private hospital may accept voluntary patients as provided therein, but if an indigent person is accepted as a voluntary patient in such private hospital, the private hospital may not look to the county court for reimbursement under procedures outlined in subparagraphs 3, 4 or 5 of Section 27 of the Act.

Lastly, we take up the inquiry found on page 2 of Judge Lang's letter, reading as follows:

Honorable Scott O. Wright

"Section 8, subsection 1, line 3: should there be a comma after 'county court'? If so, it would mean the county court, except in City of St. Louis or class one county, would provide for transportation,--and in St. Louis or class one counties, the probate court would do so. As it is now, I can't tell what is meant."

Subparagraph 1 of Section 8 of the Act reads as follows:

"Section 8. 1. Whenever an individual is about to be hospitalized under the provisions of sections 3, 4, 5 or 6 the county court or the probate court if the individual is a resident of the City of St. Louis or a class one county, upon request of a person having a proper interest in the individual's hospitalization, and if the court finds that the individual is entitled to be hospitalized as a county patient, or that such action is necessary for the individual's physical and mental health, shall arrange for the individual's transportation to the hospital with suitable medical or nursing attendants and by such means as may be suitable for his medical condition. Whenever practicable, the individual to be hospitalized shall be accompanied by one or more of his friends or relatives." (Emphasis supplied.)

In the course of passage, Senate Bill No. 59 was amended in several particulars. As this Senate Bill was "perfected" we find subparagraph 1 of Section 8, reading, in part, as follows:

"Section 8. 1. Whenever an individual is about to be hospitalized under the provisions of sections 3, 4 or 5, the county court, upon the request of a person having a proper interest in the individual's hospitalization, * * *" etc. (Emphasis ours.)

House Substitute for House Committee Amendment No. 5, to Senate Bill No. 59, as perfected, read, in part as follows:

Honorable Scott O. Wright

"Amend Senate Bill No. 59, Page 8, Section 8, Line 3; by inserting after the word 'court' and before the comma the following: 'or the probate court if the individual is a resident of the City of St. Louis or a class one Counties' * * *"

A reading of the amendment quoted above clearly discloses that the only amendment intended to be made in line 3 of Section 8 of the Act was to insert the language "or the probate court if the individual is a resident of the City of St. Louis or a class one Counties." Immediately preceding the amendment the Act had designated the "county court" exclusively as the court to determine whether the patient was to be hospitalized at county expense. The amendment is in the disjunctive and obviously selects the probate court, in the City of St. Louis and in Class One counties, as the court which will determine whether the patient is to be hospitalized at the expense of Class One counties and the City of St. Louis. The language of the amendment will outweigh the directive therein as to the new position of the comma, for to construe the amendment otherwise would result in an unreasonable and absurd construction. License for this interpretation is found in the following language from State ex rel. Geaslin v. Walker, 257 S.W. 470, 302 Mo. 106, 1.c. 124:

"Clearly the use of a comma, or even a period, is not controlling upon the question of proper construction, where such use would result in an unreasonable or absurd construction. Cases may be found in our reports where entirely different words, and in fact words of exactly opposite meaning, have been held to have been intended in place of the word actually used, where the word used was clearly an error and would give an absurd or impossible meaning to the statute."

The plain language of the amendment in this instance indicates that the legislature did not intend to place the power in the county court or the probate court, with a choice being uncontrolled; for the additional language of the amendment directs in what specific instances the probate court may act, to-wit, in those instances where the person to be confined is a resident of the City of St. Louis or a resident of a Class One County. We conclude that line 3, Section 8 of Senate Bill No. 59, as truly agreed to and finally passed, should be so read as to employ punctuation by the use of a comma immediately after the word "court" appearing therein.

Honorable Scott O. Wright

CONCLUSION

It is the opinion of this office that subparagraph 3, Section 7, of Senate Bill No. 59, passed by the 68th General Assembly of Missouri provides the mechanics for extending a proceeding for temporary, emergency confinement under Sections 5 or 6 of the Act into a formal judicial proceeding for involuntary hospitalization under Section 3 of the Act; that the court appointing examining physicians under Section 3 of the Act may appoint qualified physicians of their choosing except when the patient is confined in a municipal hospital, and in such event the physicians chosen must be members of the municipal hospital staff; that the Act contains no provision which would authorize a state hospital to condition the giving of voluntary hospitalization to indigent persons under Sections 17 and 27 of the Act only after hearing and commitment; and that line 3, Section 8 of Senate Bill No. 59, as truly agreed to and finally passed, should be so read as to employ punctuation by the use of a comma immediately after the word "court" appearing therein.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:vlw

TOWN OR VILLAGE: It is the duty of the town or village collector
COLLECTORS: to collect those taxes levied by the board of
TAXES: trustees of an incorporated village or town that
lies partly within the boundaries of a fourth
class county.



December 27, 1955

*See Op. 31 dated May 16, 1950
to Frank*

Honorable Thomas G. Woolsey
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I would appreciate your forwarding or rendering me an opinion as to whether or not the county collector of a 4th class county is required by law to collect taxes levied by the Board of Trustees of an incorporated village that lies partly within the boundaries of such county.

"It would appear to me that Section 80.480, Missouri Revised Statutes, 1949, provides for the collection of such taxes by a city or village collector (the establishment of such office being provided for in Section 80.240, Missouri Revised Statutes, (1949) and then if the city or village collector is unable to collect such taxes and some become delinquent, the county collector then has a duty, if he is so requested by the Board of Trustees of such town or village, to collect such delinquent taxes.

"However there seems to be a difference of opinion among several attorneys that the Board of Trustees of the village involved in this matter locally have consulted;

Honorable Thomas G. Woolsey

therefore I am hereby requesting a formal opinion from your office."

All reference to statutes will be to RSMo 1949.

Section 80.240 reads:

"Such board of trustees shall have power to appoint an assessor, collector, constable, or marshal, treasurer, and such other officers, servants and agents as may be necessary, remove them from office, prescribe their duties and fix their compensation."

This section was repealed and reenacted in exactly the same form by Laws of Missouri, 1953, p. 268. It will be noted that the above section provides, among other appointments, for the appointment of a city collector.

Section 80.480 reads:

"All assessments on real and personal property within the limits of such town, which may be certified and transmitted to the board of trustees, from time to time, as provided in section 80.460, shall be taken and considered as the lawful and proper assessment on which to levy and collect the municipal taxes of the town, and the payment of all taxes authorized by this chapter shall be enforced by the collector in the same manner and under the same rules and regulations as may be provided by law for collecting and enforcing the payment of state and county taxes, and for that purpose it shall be the duty of the board of trustees to require the collector, annually, to make out and return under oath, a list of delinquent taxes remaining due and uncollected on the first day of January of each year, to be known as the delinquent list. It shall be the duty of the board of trustees, at the next meeting after such delinquent list shall be returned, or as soon thereafter as convenient, carefully to examine the same, and if it shall appear that all property and taxes contained in said list are properly returned as delinquent, they shall approve

Honorable Thomas G. Woolsey

such list and cause an order of approval to be entered on the journal, and the amount of taxes in such list to be credited on the account of the collector; and shall also cause said delinquent list or a certified copy thereof, with the bills therefor, to be placed in the hands of the county collector, who shall give a receipt therefor and proceed to collect the taxes due thereon, in like manner and with the same effect as delinquent taxes for state and county purposes are collected. The said collector shall pay over the taxes collected to the city treasurer, at the times and in the manner provided by law for the payment of county taxes to the county treasurer, and shall make the same statements and settlements for such taxes with the board of trustees, and at the same time as may be provided by law for statements and settlements with the county court for county taxes, and all taxes shall bear the same rate of interest, and the same penalties shall attach to the nonpayment thereof when due, as may be provided by law in cases of county taxes. A certified copy of any tax bill included in the delinquent list, approved by the board of trustees, shall in all cases be prima facie evidence that the amount therein specified is legally due by the party against whom such tax bill is made out, and that all provisions of the law and ordinances have been duly complied with, and that the same is a lien on the property therein described."

It will be noted that the above reference to the "collector", is an undoubted reference to the city collector provided for by Section 80.240, supra, whose duty it is to enforce "the payment of all taxes authorized by this chapter" which certainly mean the taxes levied by the board of trustees of the town and/or village. It is also made the duty of the collector to make out a delinquent tax list which shall be turned over to the trustees, who shall, after examination, turn it over to the "county collector" for collection.

Honorable Thomas G. Woolsey

It would seem to be perfectly clear from the above language that the town or village collector is required by law to collect those taxes levied by the board of trustees, otherwise, there would be no point whatever in appointing a town or village collector. This fact is made clear also by the further fact that Section 80.480, supra, states that the "collector" shall make out a delinquent tax list which he shall turn over to the board of trustees which, after examination, shall turn over to the "county collector" for collection.

CONCLUSION

It is the opinion of this department that it is the duty of the town or village collector to collect those taxes levied by the board of trustees of an incorporated village or town that lies partly within the boundaries of a fourth class county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/ld/mw